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LEAGUE OF UNITED LATIN AMERICAN CITIZENS

PRELIMINARY REVIEW: IMPACT OF VOTING RIGHTS ACT Sec. 5 (Texas)

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About LULAC

With approximately 115,000 members throughout the United States and Puerto Rico, LULAC is the largest and oldest Hispanic Organization in the United States. LULAC advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans through community-based programs operating at more than 700 LULAC councils nationwide. The organization involves and serves all Hispanic nationality groups.

Historically, LULAC has focused heavily on education, civil rights, and employment for Hispanics. LULAC councils provide more than a million dollars in scholarships to Hispanic students each year, conduct citizenship and voter registration drives, develop low income housing units, conduct youth leadership training programs, and seek to empower the Hispanic community at the local, state and national level.

In addition, the LULAC National Educational Service Centers, LULAC's educational arm, provides counseling services to more than 18,000 Hispanic students per year at sixteen regional centers. SER Jobs for Progress, LULAC's employment arm, provides job skills and literacy training to the Hispanic community through more than forty-eight employment training centers located throughout the United States. The LULAC Corporate Alliance, an advisory board of Fortune 500 companies, fosters stronger partnerships between Corporate America and the Hispanic community.

PRELIMINARY REVIEW OF THE IMPACT OF SECTION 5 ON LATINO VOTERS IN TEXAS

Compiled by George Korbel; Introduction by Jose Garza; Edited by Jose Garza and Luis Vera
for LULAC

I. Introduction and Historical Background

Meaningful participation in the Texas political process, prior to the late 1960s and early 1970s was virtually closed to the Mexican American community.¹ Moreover, Mexican Americans in Texas were subjected to severe and invidious discrimination in housing, education, employment, public accommodations, and politics that impaired their ability to participate in the political process.² The civil rights movement and numerous other factors, energized the Mexican American community into political action in the late 1960s and early 1970s and changes slowly improved the lot of most Mexican Americans.³ Yet, despite the effort of civil rights organizations such as LULAC, the American G I Forum, and MALDEF and the political organization, the Raza Unida Party, little progress was made in increasing the number of Mexican Americans elected officials. For instance in 1967, while Mexican Americans composed more than 15% of the Texas population, only six percent (9 out of 150) of the members of the Texas House of Representatives and only three percent (1 of 31) of the Texas Senate were Mexican Americans.⁴ By 1980, as the civil rights activity in Texas slowed, the number of Mexican American elected officials had not significantly increased. In 1980, the Mexican American population of Texas had increased to over eighteen percent yet the number of Mexican Americans in the Texas House of Representatives had increased to only fifteen members out of 150.⁵ At the local level, the picture was even more dismal. In 1973, 72 of 1,270 (5.7%) members of the Texas county commissioners' court (counties in Texas are governed by Commissioners' Court composed of a County Judge and four County Commissioners) were Mexican Americans.

In 1975 the Congress extended coverage of the extra ordinary remedial provisions of the Voting Rights Act to Texas. Beginning in about 1979 and for several years thereafter, LULAC joined forces with three civil rights law firms in undertaking a litigation campaign focused on using and enforcing the provisions of the Voting Rights Act and the one person, one vote constitutional principal in an aggressive fashion. This effort dramatically altered the political landscape in Texas.

¹ See David Montejano, *Anglos and Mexicans in the Making of Texas*, 288-97 (1987); Robert Brischetto, et al., *Texas*, in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* 235-42 (Chandler Davidson and Bernard Grofman, eds. 1994).

² See Montejano, at 292-93; Brischetto, at 254-57.

³ See generally Montejano and Brischetto.

⁴ Brischetto, *supra*, at 243.

⁵ Steve Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980s*, 34 Sw. L. J. 607, 633-34 (1984).

After two decades of litigation and redistricting, and advocacy before the United States Department of Justice, Mexican Americans increased by 79% to 129 of 1270 (10.15%) of the members of the county commissioners courts in Texas in 1994.⁶ In the Texas Legislature the number of Mexican American legislators also dramatically increased. Between 1980 and 1994 the number of Mexican American members of the Texas House of Representatives increased from 15 to 27. Moreover, a study of cities that changed from at-large to some form of single member districts suggests that the advocacy and litigation done by LULAC, together with MALDEF, TRLA, and SWVRP during the late 1970s through the 1990s was a substantial catalyst for a dramatic increase in the representation levels for Mexican Americans.⁷

In each of the instances where barriers to minority voting were challenged the special remedial provisions of the Voting Rights Act were crucial in achieving success.

What follows is the initial result of a research project under-taken by LULAC to document the cases and instances in which LULAC and other civil rights advocates have successfully employed the Voting Rights Act to protect Latino and minority voting rights in Texas in the last twenty years.⁸

II. Section 5 litigation

A review of some recent cases decided by Federal Courts in Texas and letters of objection where Section 5 was used to prevent discriminatory voting practices against minority Texas voters and that document the existence of racially polarized voting in Texas.

The North East ISD is one of the ten largest in Texas and covers virtually the entire Northwest quadrant of San Antonio and Bexar County.

In *League of United Latin Am. Citizens v. North E. Indep. Sch. Dist.*, 903 F. Supp. 1071 (W.D. Tex. 1995) the United States District Court sitting in San Antonio made a number of

⁶ See Texas State Directory Press, Texas State Directory, 291-445 (1994).

⁷ See Brischetto, *supra*, at 254-60.

⁸ LULAC and other Latino advocacy groups and individual Latino voters have used the provisions of Section 5 to block the use of discriminatory election schemes over the last twenty-five years. The examples contained in this paper are not a comprehensive listing but only a small sample of instances in which Section 5 has benefited Latino voters. LULAC is still compiling data on actions by LULAC and others on behalf of Latino voters and will submit a more comprehensive list at a future date.

LULAC is also doing research on findings by Texas courts on the issue of racially bloc voting in Texas elections and will submit the finding of this research as it is completed.

findings demonstrating the discriminatory impact of at large elections on Latino voters. Included among its findings were the following:

23. Dr. Flores also analyzed the NEISD school board elections from 1973 to 1994 in terms of the win rate of candidates by race. That study produced the following: (footnote omitted)

[*1078]

NEISD Board of Trustees Elections for 1973-1994

	Race/Ethnicity	Candidates by Winner
Anglo	47(36%) n37	(98%) n38
Hispanic	1(11%)	(2%)
Blacks	0(0%)	(0%)

This means that an Anglo candidate was the winner in 47 of 48 elections, a Hispanic candidate in only 1 out of 48 elections, and a Black candidate has never won. Put in terms of percentages, this means that an Anglo was the winner in 98% of the elections, an Hispanic was the winner in only 2% of the elections, and a Black has never won.

n37 This figure represents the percentage of all Anglo candidates that won. TR. II, pp. 50-51..

n38 This figure represents the percentage of elections won by race. TR. II, p. 50.

----- End Footnotes-----

24. Dr. Flores prepared another chart showing the results of NEISD school board elections from 1973 to 1994 in terms of the total number of votes received by each candidate, the percentage of total votes received by each candidate, order of finish of each candidate, and the votes needed to win by the losing minority candidate. That chart shows the following: (footnote omitted)

Elections Results of NEISD Board of Trustee Races with Minority Candidates

Year	Candidate	Votes	% Votes	Finish	Needed to Win
1973	O'Connor	1650	.436	1	n/a
	Delavan	1609	.425	2	n/a
	Meadar	273	.07	3	n/a
	Dresslar	146	.038	4	n/a
	Saenz* 102		.026	5	1610 n40

*This means that even if Saenz had received all the votes of the other two losing candidates, Meader and Dresslar, she still would have finished third.

Year	Candidate	Votes	% Votes	Finish	Needed to Win
1974	Higginbotham	1849	.23	1	n/a
	Winn	1745	.22	2	n/a

Harris	1641	.20	3	n/a
Kendall	619	.08	4	n/a
Chaloupka	371	.05	5	n/a
Walter	318	.04	6	n/a
Garza*	250	.03	7	1642 n41
8 other Anglos	1266	.15	8-15	n/a

*This means that even if Garza had received all the votes of the 8 Anglo candidates who finished below him, he still would not have received enough votes to win one of the three seats up for election.

Year	Candidate	Votes	% Votes	Finish	Needed to Win
1977	Shaw	6560	.257	1	n/a
	Winn	6405	.25	2	n/a
	Harris	5939	.23	3	n/a
	Higginbotham	4921	.19	4	n/a
	Garza	1642	.06	5	4298 n42
1978	Wenglein	2468	.47	1	n/a
	Hallmark	2326	.44	2	n/a
	Garza	481	.09	3	1988 n43
1986	Everett 3354	.51	1	n/a	
	Flores*	1522	.23	2	1833
	Kimbrough	981	.15	3	n/a
	Eanes	574	.09	4	n/a
	Garcia	121	.02	5	3234

*This means that Flores would not have won even if he had received all the votes garnered by Kimbrough, Eanes and Garcia. Likewise, Garcia would have lost even if he had received all of the votes received by Flores, Kimbrough and Eanes.

Year	Candidate	Votes	% Votes	Finish	Needed to Win
1992	Ojeda	1638	.58	1	n/a
	Saidi	1203	.42	2	n/a
1993	Pruitt	17291	.55	1	n/a
	Hite	6636	.21	2	n/a
	Miller-Ramos*	5649	.18	3	11643
	Olezene n44	1900	.06	4	15392

*This means that Miller-Ramos would have lost even if she had received all of the votes received by Hite and Olezene Likewise, Olezene would have lost even if she/he had received all of the votes cast for Miller-Ramos and Hite.

Year	Candidate	Votes	% Votes	Finish	Needed to Win
1994	McCabe	6410	.57	1	n/a
	Shackelford n45	2192.	20	2	n/a
	Miller-Ramos*	1808	.16	3	4603
	Peppers	773	.07	4	n/a

*This means that Miller-Ramos would not have won even if she had received all of the votes received by Shackelford and Peppers. Likewise, Shackelford would not have won even if

she/he had received all of the votes received by Miller-Ramos and Peppers.

----- Footnotes ----- -n40 Two trustees elected.

n41 Three trustees elected.

n42 Three trustees elected using plurality voting.

n43 Plurality elections with place system.

n44 Olezene is a Black. TR. II, p. 54.

n45 Shackelford is a Black. TR. II, p. 54.

----- End Footnotes-----

25. An analysis of NEISD support for minority candidates in NEISD school board elections in terms of the minimum percent of Hispanic votes received and the maximum percent of Anglo votes received yielded the following figures: (footnote omitted)

[*1079]

NEISD Support For Minority Candidates Board of Trustees Elections, 1986-1994
Minimum %Maximum %

Year	Candidate	Hisp. Vote	Anglo Vote
1986	Flores +Garcia*	.69	.04
1992	Ojeda*	.58 (footnote omitted).	.75
1992	Saidi	.42	.30
1993	Miller-Ramos**	.48	.09
1994	Miller-Ramos**	.50	.13

*This data was calculated using Voting Age Population.

**This data was calculated using Hispanic Registered Voters.

26. A chart in which Dr. Flores compares, inter alia, the preferred candidate of Hispanic voters to the preferred candidate of Black voters in NEISD elections shows the following:
n48NEISD School Board Elections

Year	Preferred Candidate	
	Hispanic	Black
1986	Bankler	Bankler
1987	Shacklett	Shacklett
1990	Pruitt	Chalk
1993	Ramos	Ramos

27. Dr. Flores also analyzed NEISD school board elections in terms of the minimum percent of non-Hispanic votes n49 received by Anglo candidates as compared to the percent of non-Hispanic votes received by Hispanic candidates and found the following:
n50

Anglo "Block Voting"Over-Lapping Percentages

Year	% Non-Hisp Reg. Vtrs	% Votes for Hisp Candidates	Minimum Non-Hisp. Vote Forfor Anglo Candidates	% Vote for Anglo Candidates
1977	88%	6%	88% - 6% = 82%	82%
1978	88%	9%	88% - 9% = 79%	79%
1986	88%	25%	88% - 25% = 63%	63%
1992	88%	58%	88% - 58% = 30%	30%
1993	87%	18%	87% - 18% = 69%	69%
1994	87%	16%	87% - 16% = 71%	71%

n49 As defined by Dr. Flores, the phrase "percentage of non-Hispanic vote" refers to the percentage of votes received from registered Anglo and Black voters. TR. II, p. 55.

n50 Pls. Exh. 38-E.

----- End Footnotes-----

29. A comparison of the candidate preferred by Hispanics with the candidate preferred by Blacks in exogenous elections snows the following: n68City of San Antonio

City of San Antonio Preferred Candidates		
Year	Hispanic	Black
1985	Cisneros	Cisneros
1987	Cisneros	Cisneros
1989	Cockrell	Cockrell
1991	Berriozabal	Berriozabal
1993	Wolff	Wolff
General Elections Preferred Candidates		
Year	Hispanic	Black
1986 n69	Lee	Lee
1986 n70	Cisneros	Cisneros
1990 n71	Rodriguez	Rodriguez
1990 n72	Rivera	Rivera
1992 n73	Offutt	Coulter

Thus, Blacks and Hispanics preferred the same candidate in all 5 city elections and 4 of the 5 general elections.

- - - - - Footnotes - - - - -

n68 Pls. Exh. 49.

n69 Bexar County Commissioner.

n70 State District Judge.

n71 Bexar County District Attorney.

n72 State District Judge.

n73 State Board of Education.

- - - - - End Footnotes - - - - -

30. A study of NEISD support for minority candidates in exogenous elections in terms of the minimum percent of Hispanic vote received and the maximum percent of Anglo vote received was as follows: n74

NEISD Support For Minority Candidates			
General Elections, 1986-1994			
Year	Candidate	Hispanic	Anglo
1988	Gonzalez	.71	.32
1988	Canales	.67	.20
1988	Rodriguez	.58	.23
1988	Cantu	.58	.15
1988	Mireles	.69	.20
1988	Garza	.76	.34
1990	Morales	.78	.49
1992	Guerrero	.73	.11
1992	Overstreet	.78	.22
1992	Benavides	.76	.24
1992	Gabriel	.85	.24
1992	Roman	.89	.28
1992	Lopez	.80	.36

This means that the minority candidate in exogenous elections received, on average, a maximum of 26% of the Anglo vote in NEISD and a minimum of approximately 74% of the Hispanic vote in NEISD.

31. Several facts are undeniable in light of the results of the analyses performed by Dr. Flores.

32. First, there is a high degree of cohesion among Hispanic voters in NEISD.

[*1081]

33. Second, there is a high degree of cohesion among Hispanic and Black voters in NEISD.

34. Third, there is a high degree of cohesion among Anglo voters in NEISD.

35. Fourth, **there is a clear and persistent history of racially polarized voting in both NEISD school board elections as well as in exogenous elections as evidenced by the fact that Anglo voters have consistently voted together in large percentages for Anglo candidates while Hispanic and Black voters have voted together for either the Hispanic or Black candidate.**

36. Fifth, Anglos have consistently voted together for the Anglo candidate in such large percentages that the [**27] minority candidate, despite receiving a relatively significant percentage of minority votes, has rarely received enough Anglo crossover votes to win.

37. Sixth, the correlation between the race of the voter and the voter's choice of candidate is statistically significant and cannot be attributed to chance.

38. Dr. William Rives defendants' expert, testified that his analyses of NEISD school board elections and exogenous elections failed to reveal the existence of racially polarized voting in the NEISD, bloc voting by Anglo voters to defeat the preferred candidate of minority voters, or cohesion among Hispanic and Black voters.(footnote omitted) However, this Court, for the reasons set forth below, finds that Dr. Rives' testimony is not credible.

39. First, Dr. Rives used the voting age population, not the actual turnout at the polls, as his independent variable. (footnote omitted) However, on cross examination, Dr. Rives admitted that the best measure of the independent variable is actual turnout at the polls, and the second most accurate data is voter registration data by precinct and ethnicity. (footnote omitted)

40. Second, in trying to discern the existence of racially polarized voting in NEISD, Dr. Rives, unlike Dr. Flores, limited his analysis to NEISD school board elections. (footnote omitted) And, unlike Dr. Flores, Dr. Rives did not restrict his analysis to only those elections in which there was a minority candidate running against an Anglo candidate. Instead, he looked both at elections pitting an Anglo candidate against a minority candidate as well as elections having only Anglo candidates. (footnote omitted) However, on cross-examination, Dr. Rives admitted that this method of analysis was inconsistent with the method of analysis used by Dr. Bernard Groffman, whose analysis was approved by the Supreme Court in *Gingles*, as well as that of Dr. Alan Lichtman, Dr. Albert Table, Dr. Robert Brischetto, all of whom are recognized experts in the field of racially polarized voting. (footnote omitted)

41. What is more, Dr. Rives accorded the same weight to an Anglo-Anglo election as he did to an Anglo-minority election despite acknowledging that doing so is contrary to the Fifth Circuit's observation in *Citizens for a Better Gretna v. City of Gretna* (footnote omitted) that, "*Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter--out only within the context of an election that offers voters the choice of supporting a viable minority candidate."(footnote omitted)

42. The value of Dr. Rive's opinion is further diminished by the fact that, although he analyzed general elections, he did not rely on the results of those analysis in formulating an opinion as to the existence of racially polarized voting. According to Dr. Rives, the reason he did not rely on those results is because such elections are partisan elections. Yet, Dr. Rives admitted during cross-examination that, although it was possible to do so, he had not done a multi-variate analysis to determine the effect that party affiliation had [*1082] on the results. (footnote omitted) He also conceded that he had failed to perform a BERA on the primary elections as had been done by Dr. Gibson, plaintiffs' expert, to measure the impact of party affiliation on the results of general elections. (footnote omitted)

43. With respect to his opinion that there is no cohesion among Hispanic voters in NEISD, Dr. Rives testified that this conclusion was based on the fact that his analysis showed that Hispanic voters with the exception of the 1986 election, never gave a candidate a majority of their vote, but instead spread their votes among all candidates. (footnote omitted) Yet when pressed on cross-examination about what he considered to be an indication of cohesion of minority voters in a plurality election system, Dr. Rives agreed that expressing a clear preference for a candidate does not necessarily mean that a candidate must have received a majority of the minority votes. (footnote omitted) Using that standard, it is obvious that Hispanics have voted cohesively in almost every NEISD school board election from 1986 to 1994. In 1986, Sankler received 78.1% of the Hispanic vote for place 5, Everett received 49.8% for Place 6, and Lampert received 66.4% for place 7. In 1987, Shacklett received 60.9% of the Hispanic vote for place 1, and Pruitt received 58.6% for place 2. In 1988, Coulter received 53.5% of the Hispanic vote for place 3 while McDonald received 46.1% for place 4. In 1989, McDonald received 41.7% of the Hispanic vote for place 5, Caldarola received 46% for place 6, and Ogden received 57% for place 7. In 1990, Bray received 44.2% of the Hispanic vote for place 1 and Pruitt received 71.7% for place 2. In 1991, McCabe received 80.2% of the Hispanic vote for place 3, while Saidi received 49% for place 4. In 1992, Ojeda received 58.6% of the Hispanic vote for place 6. In 1993, Bennett received 69.1% of the Hispanic vote for place 1, while Ramos-Miller received 45.9% for place 2. In 1994, Ramos-Miller received 41.9% of the Hispanic vote for place 3, while Gamble received 46.8% for place 4. n87

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n87 Dfs. Exh. 7. The 1986-1988 and 1991 results are based on election-day returns, while all other results are based on total results. Dfs. Exh. 7.

----- End Footnotes-----

44. Dr. Rives' conclusion that there is no cohesion between Black and Hispanic voters in NEISD is likewise suspect because it is based only on his study of school board elections. As noted earlier, Dr. Rives disregarded the results of the analysis he performed on the general elections because he assumed that party affiliation, rather than race, accounted for the results in such elections. However, Dr. Rives performed no multi-variate analysis that

would have proved or disproved this assumption. (footnote omitted) More importantly, Dr. Rives admitted that his analysis of the general elections showed, inter alia, both that Hispanics and Blacks generally vote together and that they vote differently than Anglo voters in NEISD. (footnote omitted)

45. With respect to whether Anglos vote sufficiently as a bloc to usually defeat the preferred candidate of the Hispanic and Black voters of NEISD, one need only look at the results of the NEISD school board elections featuring a minority candidate from 1973 to 1994, as set forth in Pls. Exh. 38-D, 38-E and 38-F, to realize that the Anglo voters of NEISD consistently vote as a bloc to defeat the preferred candidate of the Hispanics and Blacks in NEISD school board elections.

46. As calculated by Dr. Korbel, the total population of NEISD is 261,172. n90 If [*1083] NEISD were divided into seven equally populated districts, each district would ideally contain 37,310 people. One of those proposed districts, Proposed District No. 3, would be a district in which the combined Hispanic and Black VAP would constitute a majority of the VAP.

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n90 According to Dr. Korbel, the reason the total population figure used by him is 261,172 instead of 254,106, the total population figure of NEISD according to the unadjusted 1990 Census, is that he utilized whole "census block", the smallest unit of the 1990 Census, in drawing the proposed districts. This means that whenever a census block was divided by the NEISD boundary, Dr. Korbel treated the entire census block as being within the NEISD boundary lines and included the total population of the census block in the total population figure of NEISD. TR. IV, pp. 58-60.

----- End Footnotes-----

47. As calculated by Dr. Korbel, the VAP of Proposed District 3 would be 49% Hispanic, 3% Black, and 46.8% Anglo. (footnote omitted)

48. However, defendants have attacked the method by which Dr. Korbel calculated the population of Proposed District 3. Specifically, Dr. Tucker Gibson, the defendants' demographics expert, testified that the correct method of calculating the population in census blocks split by NEISD's boundaries is to determine the housing counts in split portions of the census block and then allocate the population of the census block in accordance with the percentage of the housing units in the parts of the split census blocks. Using this method of calculation, Dr. Gibson arrived at the following population figures for NEISD and

Plaintiffs' Proposed District 3: (footnote omitted)

NEISD Total Population:	253,582	(100.0%)
Anglo:	173,349	(68.4%)
Hisp.:	62,454	(24.6%)
Black:	12,559	(5.0%)

Other:	270	(.1%)
NEISD Voting Age Pop.	189,659	(100.00%)
Anglo:	134,909	(52.70%)
Hisp.:	42,459	(22.00%)
Black:	8,391	(4.00%)
Other:	168	(.09%)

Proposed District 3

Total Population:	33,856	(100.0%)
Anglo:	14,222	(42.0%)
Hisp.:	18,102	(53.5%)
Black:	1,084	(3.2%)
Other:	448	(1.3%)

Proposed District 3

Voting Age Pop.	24,719	(100.0%)
Anglo:	11,592	(46.9%)
Hisp.:	12,094	(48.9%)
Black:	677	(2.7%)
Other:	356	(1.4%)

46. Thus, as Dr. Gibson conceded, even using his method to calculate the total population and VAP of both NEISD and Plaintiffs' Proposed District 3, the Plaintiffs' Proposed District 3 would still contain a combined Hispanic and Black VAP of 51.6%. In short, it would contain a minority majority of the VAP of Proposed District 3.

49. Defendants further contend that plaintiffs should be required to show that they would constitute a majority of the voting age citizenship population in Proposed District 3.

50. However, Dr. Korbel testified that in all the years he has been involved in drawing redistricting plans and submitting them for clearance by the Department of Justice, no redistricting plan has been rejected for failing to take citizenship into account. (footnote omitted)

51. Likewise, Dr. Rives, defendants' own expert, conceded that he knew of no case authority requiring the plaintiffs to show that they comprise a majority of the citizen voting age population in a proposed single-member district. That requirement, Dr. Rives admitted, was imposed by him only at the direction of defense counsel. (footnote omitted)

52. The Fifth Circuit, by whose holdings this Court is bound, has repeatedly held that plaintiffs in a § 2 case need only show that they can draw a proposed district in which they comprise a majority of the voting age population in order to satisfy the first prong of

Gingles. n95

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n95 See *LULAC v. Clements*, 986 F.2d 728, 743 (5th Cir. 1993), rev'd on other grounds, 999 F.2d 831 (5th Cir. 1993) (en banc), (to satisfy first Gingles factor, the minority group must ordinarily be able to draw a single member district in which a majority of the voting age population is minority) (emphasis in original); *Westwego Citizens for Better Government v City of Westwego*, 946 F.2d 1109, 1117 n. 6 (5th Cir. 1991) ("*Westwego II*"); *Brewer v. Ham*, 876 F.2d 448, 451 (5th Cir. 1989) (affirming district court's entry of judgment for defendants due to failure of minority plaintiffs to propose a single-member district within the school district that would contain a majority of the voting age population of a minority group including Blacks, Hispanics, and Asians); *Westwego Citizens for Better Government v. Westwego*, 872 F.2d 1201, 1205 n. 4 (5th Cir. 1989) ("*Westwego I*") (noting that evidence of size of "voting age" population is critical to a vote dilution claim); *Overton v. City of Austin*, 871 F.2d 529, 535-36 (5th Cir. 1989) (affirming judgment of district court in which district court found, inter alia, that neither Black nor Hispanic plaintiffs constituted a majority of the voting age population); *Houston v. Haley*, 859 F.2d 341 (5th Cir. 1988), vacated on other grounds, 869 F.2d 807 (1989), (where the court referred to this issue as "critical").

----- End Footnotes----- [**37]

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53. Likewise, except for a lone case decided after the trial in this matter n96, the district courts in the Fifth Circuit, in evaluating whether plaintiffs in a vote dilution case have satisfied the first prong of Gingles, have required only that the plaintiffs prove that they would constitute a minority majority of the voting age population in at least one proposed district. n97

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n96 *Campos v. City of Houston*, 894 F. Supp. 1062, 1995 WL 478151, No. H-91-0885 (S.D.Tex. July 31, 1995) (finding, in granting the defendant City of Houston's motion for summary judgment, that, in analyzing the first prong of the *Gingles* test, using the data of voting age Hispanic citizens is the correct measure of the Hispanic population's ability to create a majority voting district). Id. at *3.

n97 See *Concerned Citizens for Equality v. McDonald*, 863 F. Supp. 393, 402 (E.D.Tex. 1994) (analysis assumes that the appropriate analytical and remedial standard is bare majority of voting age population); *Clark v. Roemer*, 777 F. Supp. 445, 452-452 (M.D.La. 1990) ("although the Fifth Circuit has not yet squarely so held, it seems rather clear that the majority population with which *Thornburg v. Gingles* is concerned is a voting majority, not simply a population majority. The court of Appeals has at least implied that the single-member district which is created must contain at least a voting age majority of the minority group . . . This court concludes that in order to be viable under the *Thornburg v. Gingles* rationale any such district must contain at least a voting age majority of the minority group.") (emphasis in original); *Ewing v. Monroe County, Mississippi*, 740 F. Supp. 417, 419 (N.D.Miss. 1990) (distribution of blacks through county meets the first prerequisite so as to at low the creation of at least one supervisory

district and one justice court judge district with a majority black voting population) (emphasis in original); **Williams v. City of Dallas**, 734 F. Supp. 1317, 1387 (N.D.Tex. 1990) (with a 65% African-American concentration, there can be 3 black districts out of 8, 4 out of 10 or 11, and 5 out of 15--with a majority African-American voting age population) (emphasis in original).

----- End Footnotes----- [**38]

54. The Court finds that the plaintiffs have shown that they can draw a proposed single member district in which Hispanics and Blacks constitute a majority of the voting age population, as evidenced by Plaintiffs' Proposed District 3.(footnote omitted)

----- End Footnotes-----

55. The Court also finds that the Plaintiffs' Proposed District 3 is geographically compact. With regard to the shape of Plaintiffs' Proposed District 3, the Court finds that the two-headed dragon configuration is not the result of racial gerrymandering, but is due in large part to the plaintiffs having to draw around the northern boundary of the Alamo Heights Independent School District. n99 (footnote omitted)

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n99 The shape of Plaintiffs' Proposed District 3 is no more disjointed or contorted than the district approved by the district court in **Hastert v. State Bd. of Elections**, 777 F. Supp. 634 (N.D.Ill. 1991) (holding that Chicago/Cook County's Hispanic community was geographically compact within the meaning of Gingles to constitute a single district majority despite fact that proposed district encompassed separate Hispanic enclaves in northwest and southwest corners of Chicago, and ran narrow corridor connecting those enclaves around end of existing congressional district, and had "rays" "shooting out" to capture additional Hispanic population, with resulting district that resembled "Rorschach blot" turned on its side; therefore, proposed Hispanic congressional district, although uncouth in configuration, would be approved). Plaintiffs' Proposed District 3 is also distinguishable from the proposed district rejected by the district court in **East Jefferson Coalition for Leadership and Development v. Parish of Jefferson**, 691 F. Supp. 991 (E.D.La. 1998), aff'd 926 F.2d 487 (5th Cir. 1991). There the proposed district crossed the Mississippi River, a major natural boundary, and reached around the airport to include a concentration of black voters living above the airport. Plaintiffs' Proposed District 3, on the other hand, does not cross a major natural boundary nor does it branch out in an unacceptable manner in an effort to take in an isolated concentration of minority voters.

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56. Plaintiffs also have shown that voting in NEISD school board elections is significantly polarized along racial lines.

57. As noted earlier, of the 48 candidates elected to the NEISD Board of Trustees [*1085] between 1973 and 1994, 47 are Anglo and 1 is Hispanic. Stated in percentages, this means 98% of all winners in NEISD school board elections in the past 21 years are Anglo, while 2% are Hispanic. Of the Anglo candidates who have run, 36% were

winners. By contrast, only 11% of Hispanic candidates won, while no Black candidate has ever won. (footnote omitted)

58. Absent special circumstances, there are not enough Anglo cross-over votes to allow a minority candidate to succeed in the at-large election system presently used in NEISD school board elections.

59. Richard Ojeda, the only Hispanic candidate to be elected to the NEISD school board, ran against a woman with an Iranian-sounding name, Brigetta Saidi n102, in 1992, shortly after the [First] Persian Gulf War. (footnote omitted)

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n102 However, Ms. Saidi is actually of German descent. TR. I, p. 212.

----- End Footnotes-----

60. Ojeda was elected with the support of the Positive Direction Committee ("PDC"), a slating group of Anglos within NEISD n104, and the support of at least one Anglo trustee, Bill McCabe. (footnote omitted)

61. Ojeda lost in his bid for reelection in May of 1995. (footnote omitted)

62. The PDC was formed in 1988-89 and was comprised entirely of Anglos. (footnote omitted) There is no evidence a minority ever served on the PDC.

63. There is no evidence that NEISD school board campaigns have been characterized by overt or subtle appeals to race.

64. There is no dispute that Texas has a long history of discrimination against its Black and Hispanic citizens in all areas of public life. Dr. Korbel testified in a general fashion that minority citizens had been subjected to discriminatory voter registration laws, poll taxes, racially restrictive covenants in real estate transactions (footnote omitted), and segregated schools in the past. (footnote omitted) However, the plaintiffs have offered no evidence in the form of empirical data that shows that Blacks and Hispanics in NEISD currently register to vote at a lower rate than Anglos, that the turnout level of Blacks and Hispanics is lower than that of Anglos in NEISD, or any other factor which would demonstrate that past discrimination has hampered the ability of Blacks and Hispanics in NEISD to participate presently in the political process.

65. The 1990 Census shows that 2,734 (8.9%) Hispanics over the age of 25 in NEISD were functionally illiterate or had completed less than 8 years of formal education. The functional illiteracy rate of Anglos, on the other hand, was only 3.1%. (footnote omitted)

66. The 1990 Census also reflects that only 8,031 Hispanics within NEISD were high school graduates as compared to 30,496 Anglos. Only 1,323 Blacks were high school graduates. (footnote omitted)

67. With respect to college graduates, the 1990 Census showed that 28,401 (82.1%) of the residents of NEISD with a college degree were Anglo, 4,230 (12.3%) of NEISD residents with a college degree were Hispanic, and 958 (3.1%) of NEISD residents with a college degree were Black. In other words, 80% of the holders of college degrees to NEISD are Anglo. (footnote omitted)

68. With respect to graduate and professional degrees, Anglos comprise 83.8% of the people in NEISD with graduate or professional degrees. Hispanics hold only 9.8% and Blacks 3.9%. (footnote omitted)

69. With respect to the percentage of each race which lives below the poverty level, the 1990 Census revealed that 20.4% of the Black families in NEISD live below the poverty level; that 14.2% of Hispanic families lived below the poverty level; and 7% of the Anglo families existed below the poverty level. (footnote omitted)

70. According to the 1990 Census, the mean income for Anglo households in NEISD was \$ 44,258.00, the mean income for Hispanic households in NEISD was \$ 34,109.00, and the mean income for Black households in NEISD was \$ 29,787.00. Thus, the mean income for Anglo households in NEISD was approximately 129% that of Hispanic households and 149% that of Black households. (footnote omitted)

71. The 1990 Census also shows that 30.6% of Anglo households in NEISD have annual income levels exceeding \$ 50,000 as compared to only 15% of Black households and 18.2% of Hispanic households. (footnote omitted)

72. The 1990 Census further shows that only 16.1% of Anglo households in NEISD have an annual income of less than \$ 15,000. By way of contrast, 29.4% Black households and 22.3% Hispanic households fall below that level. (footnote omitted)

73. With respect to the average per capita income, the 1990 Census indicates that Anglos in NEISD earned \$ 18,364 while Blacks and Hispanics earned \$ 11,661 and \$ 11,216, respectively. (footnote omitted) In other words, Anglos earn almost 160% the per capita income of Hispanics and Blacks.

74. The scores of NEISD Black and Hispanic students generally are considerably lower than the scores of NEISD Anglo students on the Texas Assessment of Academic Skills exam (footnote omitted), the standardized test administered by the Texas Education Agency each year to all school students in Texas. (footnote omitted)

75. The Court finds that plaintiffs have shown that Blacks and Hispanics still bear the effects of past discrimination in such areas as education,

employment and health, which hinder their ability to participate effectively in the political process.

76. Contrary to plaintiffs' assertions otherwise, the Court finds that the plaintiffs have not proved that NEISD has a history of being unresponsive to the concerns or needs of its minority community.

77. Plaintiffs claim that the naming of an athletic center of Virgil T. Blossom, an alleged racist, as evidence of the school district's insensitivity. However, the plaintiffs' assertion that Blossom was a racist is not supported by any credible evidence. What is more, Jesse Culter, who served on the NEISD school board three years, one of which as president, testified that he never even attempted to place on the agenda for consideration by the school board the renaming of the Virgil T. Blossom Athletic Center. (footnote omitted)

78. Plaintiffs also cite the fact that Robert E. Lee High School flew the Confederate flag until 1993 as evidence of the school district's insensitivity to minorities. Once again, however, the evidence shows that no one ever approached the school board and requested that the flag not be flown.(footnote omitted) Likewise, Culter admitted that he never asked that the issue be placed on the board's agenda during the three years he served as trustee. (footnote omitted) What is more, when students at the high school did voice their displeasure about the Confederate flag being flown, Bill Fisch, the principal at Lee High School, ordered that the flag not be flown and that a different symbol be used. (footnote omitted)

79. Plaintiffs also claim that the school district's administration blocked efforts by board members to review the at-large election system. Yet, Culter admitted on cross-examination that he never attempted to place the issue of single-member districts on the school board's agenda while he was a trustee n125 or since leaving the board in 1991. (footnote omitted)

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n125 TR. I, p. 70. Dr. Richard Middleton, who was Superintendent of NEISD at the time Culter served on the school board, recalled that Culter never asked him to place the single-member issue on the board's agenda. TR. IV, p. 168-169.

----- End Footnotes-----

80. Another indication of the school district's insensitivity, according to plaintiffs, is the use of race in drawing school attendance zones for Castle Hills Elementary and Redland Oak Elementary school. However, Dr. Middleton testified that all school attendance zones, including those for Castle Hills Elementary and Redland Oak Elementary, are created strictly on the basis of the number of students. (footnote omitted) With reference to Castle Hills Elementary, Dr. Middleton testified that it is a school of choice, meaning that students from a seven elementary school region can elect to attend it, regardless of race or ethnicity. n128

81. Plaintiff's also claim that the school district has displayed its insensitivity by failing to actively recruit minority teachers. While plaintiffs have introduced evidence that NEISD did not actively recruit Hispanics and Blacks until recently, defendants have come forth with evidence that since 1992 the school district has intensified its efforts to attract minority teachers by recruiting not only from Texas universities and colleges, but also to New York and California. (footnote omitted) However, as Dr. Middleton pointed out, the school district is confronted with the reality that fewer minorities are pursuing a profession in teaching. (footnote omitted) This also undercuts Plaintiffs' argument that the school district is insensitive to the needs of its minority population because it employs a teacher work force that is less than 10% Hispanic and less than 2% Black when its student population is nearly 40% minority. Plaintiffs have offered no evidence that the low level of minority teachers in NEISD is attributable to any insensitivity on the part of the school district rather than a small pool from which to recruit minority teachers.

82. Another manifestation of the school district's insensitivity, Plaintiffs argue, is the scarcity of Hispanics in administrative positions. As evidenced by Plaintiffs' Ex. P-18, of the 150 administrators in the school district, only 14 are Hispanic. (footnote omitted) However, Dr. Middleton, who is part Hispanic himself, (footnote omitted) also testified that there are 29 minority administrators in the school district, 18 of whom have been appointed since he was appointed as Superintendent in 1989. (footnote omitted) Therefore, while it may be true that Dr. Middleton's predecessors impeded the advancement of minorities to administrative positions, the Court does not find the evidence to substantiate this allegation as to Dr. Middleton.

83. Plaintiffs also offer the fact that none of the four assistant superintendents is a minority (footnote omitted) as another example of the lack of responsiveness by NEISD to the concerns of its minority population. Yet, plaintiffs failed to offer any evidence as to when and by whom these people were appointed, what their qualifications are in terms of experience and education, or anything else that would support this allegation.

84. Another example of non-responsiveness by the school district, contend plaintiffs, is the establishment of boundary lines that result in Lee High School having a student population which is 56% minorities while Churchill High School has a student population that is less than 25% minorities even though the two school share a common [*1088] boundary line and are less than five miles apart. (footnote omitted) As pointed out by Dr. Middleton, however, school boundaries are drawn based on the number of students each school can accommodate, not with an eye toward creating a racially balanced student body. Also, what plaintiffs' argument ignores is the testimony of Dr. Korbel, their own expert, that the heaviest concentration of Hispanics in NEISD is in the southern portion of Plaintiffs' Proposed District 3, where Lee High is located, due to the migration of

Hispanics into the area during the last decade as Anglos have moved out to new developments on the north side of the school district. (footnote omitted) This, rather than any insensitivity on the part of the school district, would account for the large number of minority students in Lee High School as compared to Churchill.

85. Plaintiffs also see a lack of responsiveness by the school district to the needs of its minority students in the fact that Dr. Richard Holt, the President of the school board at the time of this trial, testified that it was possible for a student to attend school in NEISD for 12 years without ever having a minority teacher. However, Dr. Holt also testified that the NEISD teaching staff is very stable with very little turnover. He also noted, as did Dr. Middleton, that there is a limited pool of minority teachers and administrators from which the school district can recruit. (footnote omitted) Moreover, as Richard Ojeda pointed out, the school district is also at a disadvantage by virtue of the fact that it must compete with other school districts, such as Alamo Heights, which can offer higher salaries to attract minority teachers. (footnote omitted) Given these other factors, the Court cannot blame the low percentage of minority teachers in NEISD on any lack of concern or effort to remedy the situation by the school district.

86. Plaintiffs cite the testimony of Dr. Jones, the African-American plaintiff, that the school board has a long history of discrimination against African-Americans as evidence of its unresponsiveness to the minority community. However, the discrimination of which Dr. Jones testified referred to discrimination that occurred when he attended school in the 1940s and to the discrimination that existed in 1960s.(footnote omitted) Dr. Jones related no incidents of discrimination by the current school board.

87. The final example of school board insensitivity offered by the Plaintiffs is the poor performance of minority students on the TAAS exams. There is no dispute that the TAAS results of minority students in NEISD are disconcerting. However, plaintiffs have not pointed to any evidence of the school board ignoring the problem or not taking steps to better prepare minority students for the TAAS exam. In fact, the evidence put on by the defendants compels the exact opposite conclusion. A broad range of programs have been enacted by the school district which are designed to identify and address the educational needs of students, including minority students, who are struggling in class and who are a risk of failing or dropping out. n140

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n140 Such programs include jump start programs for schools with a high percentage of students receiving free or reduced-price lunch; bilingual programs; mentoring programs in which businesses in the community work with children identified as being at risk of dropping out; high order thinking skills programs aimed at attracting minority students into gifted and talented programs; a year-round curriculum at Nimitz Academy and Castle Hills Elementary School, both of which have a large minority student population; the A-B schedule at White

Middle School, a program in which students attend class every other day for 1.5 hours so they can do their homework in class; and the Lee Volunteer for Excellence Program at Lee High School, which encourages students to take higher levels of math at an earlier age. NEISD has also developed remedial programs specifically designed to help students who have trouble with certain sections of the TAAS exam. TR. IV, pp. 150-154.

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88. Until 1999, there were only eight polling place within NEISD for school board [*1089] elections, even though the school district contains over 250,000 people. (footnote omitted)

89. NEISD currently utilizes a place system to elect its trustees, a voting device which prevents "single-shot" voting by minority voters. (footnote omitted)

90. Generally speaking, minority candidates have more limited resources with which to finance their campaign than do Anglo candidates in NEISD. (footnote omitted)

91. It is more expensive to run for office in the current at-large system used by NEISD than it would be to run for office in a single-member district system as proposed by plaintiffs.

92. The sheer geographical size of NEISD makes it virtually impossible for a minority candidate to conduct a grass roots or door-to-door campaign. Such a campaign could be conducted, however, in a single-member district. (footnote omitted)

93. A study by the U.S. Commission on Civil Rights reveals that Texas jurisdictions that have adopted single-member districts have experienced a two or three-fold increase in the number of elected minority candidates. (footnote omitted)

94. That same study also looked at coalition voting patterns in Texas and found that districts in which the Black and the Hispanic populations, when combined, exceed 50% of the population are characterized by Blacks and Hispanics voting together to minority candidates. Such districts, the study showed, also elect more minority candidates than does a single Black or a single Hispanic district of the same total percentage. (footnote omitted)

95. Dr. Gibson, defendants' expert, has written scholarly articles in which he reported finding that a coalition had developed between Blacks and Hispanics of Bexar County in the 1960s and 1970s and that a plurality district of Blacks and Hispanics has consistently elected black candidates in city council and state legislative elections throughout the 1970s, 1980s and 1990s. (footnote omitted)

The Court went on to find the at large election system for the election of trustees to the Northeast Independent School District to violate Section 2 of the Voting Rights Act. However, the Defendant school board was reluctant to adopt single member districts and instead determined to appeal. An appeal even if unsuccessful would delay the implementation of a remedy for years. However, LULAC discovered, after the trial, that a bond election that the school district was about to hold had never been submitted for preclearance as was required under the Voting Rights Act.

LULAC determined to oppose the bond election so long as a board elected under a discriminatory at large election system would decide how the proceeds of those bonds would be spent. Therefore, LULAC filed a Section 5 enforcement action and secured an injunction blocking the bond election and ordering the school district to submit the bond election for preclearance. Moreover, LULAC notified the school district that as long as the board of trustees was elected from a discriminatory at large election system, LULAC would oppose the bond and preclearance at the Justice Department. As a result the Defendant school district agreed to adopt single member districts and LULAC agreed to support the preclearance of the bond election.

In the first election after the adoption of single member districts a Latino candidate and an African American candidate secured election from majority minority districts.

In *Sierra v. El Paso Independent School Dist.*, 591 F. Supp. 802 (D. Tex., 1984), the United States District Court sitting in El Paso Texas made the following findings in a case challenging the at large election system used for election of the governing board for the El Paso I.S.D.:

“The El Paso Independent School District is the fifth largest independent school district in the State of Texas. It operates 70 elementary and secondary schools, and serves approximately 60,000 students. It is located entirely within the boundaries of El Paso County, Texas, and covers more than 200 square miles. n1 The school district is governed by a board of seven elected trustees. At least since 1911, all trustees have been elected at large from the district as a whole in nonpartisan elections. Prior to 1940, candidates ran for staggered two-year terms, and elections were held annually. In 1940, the term was increased to six years, still staggered, and elections are held every two years. All candidates ran at large and not by place until 1960, when the board, pursuant to enabling legislation enacted by the Texas legislature, provided for the election of members to the board by numbered positions. Election of candidates was still by straight plurality, however, without any provision for a majority run-off. In 1971, the legislature amended Section 23.11 of the Texas Education Code to permit school districts to adopt a runoff election procedure if no candidate receives a majority of the votes cast for a particular position. On November 16, 1971, the Board of Trustees of the El Paso Independent School District adopted the majority runoff procedure for all trustee elections beginning with those scheduled for 1972. Since 1972, therefore, all trustees have been chosen in at-large, by-place, majority runoff, nonpartisan elections.

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n1 One other large independent school district (the Ysleta Independent School District, seventh largest in Texas) and several smaller school districts also lie within the borders of El Paso County.

----- End Footnotes----- [**4]

It is not disputed that more than 50 percent of those who reside within the El Paso Independent School District are Mexican-American, and that 70 percent of the students enrolled in the schools of the district are Mexican-American. However, Mexican-Americans constitute only 43 percent of the registered voters within the school district. The Plaintiffs contend that the at-large, by-place, majority runoff system for electing school board trustees impermissibly dilutes the voting strength of Mexican-Americans, and makes it difficult for them to elect representatives of their choice to the school board. Therefore, Plaintiffs contend that the present election system violates both the Constitution and the Voting Rights Act.

It is now well settled that discriminatory purpose must be shown to support a finding of unconstitutional vote dilution under either the Fourteenth or Fifteenth Amendment to the Constitution of the United States. *Rogers v. Lodge*, 458 U.S. 613, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980). In the instant case, there is no evidence that the board of trustees adopted any feature of the present election system for the purpose of discriminating against any minority or ethnic group. With respect to those aspects of the system in effect before 1971, the Plaintiffs simply offered no evidence at all concerning the purpose or purposes of the school board members who participated in designing the scheme for electing trustees. For example, on January 19, 1960, the board of trustees passed the resolution calling for the election of members to the school board by numbered positions. However, the only evidence offered by the Plaintiffs concerning the adoption of this new procedure was the minutes of the board meeting itself (Plaintiffs' Exhibit 143). The minutes do not reflect any debate or discussion which would shed light upon the purpose of the board in adopting [*805] the by-place procedure. No other evidence, direct or circumstantial, was offered by the Plaintiffs which would tend to prove the state of mind or intent of the board members of that era. With respect to the 1971 board resolution adopting the majority run-off procedure, the trial testimony of past board members negates discriminatory intent. For example, Javier Montes, a Mexican-American board member, stated that he supported the resolution because of his belief that a newly-enacted state law mandated runoff elections. n2 Another Mexican-American board member, Elman Chapa, testified that he supported majority runoffs because of his concern about low voter turnout in school board elections, and his belief that a runoff might develop more interest. n3 The minutes of the board meeting at which the runoff election procedure was adopted (Plaintiffs' Exhibit 144) failed to reflect any discussion or debate which would indicate that the majority runoff was intended to dilute minority voting strength. In short, the Plaintiffs have failed to sustain their burden of proving discriminatory intent in connection with the adoption of any feature of the present scheme for electing school board members.

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n2 Mr. Montes was elected to the board of trustees in 1970 in a straight plurality election,

and was reelected in 1976 under the majority runoff procedure.

n3 Mr. Chapa was elected to the board in 1968 in a straight plurality election and reelected in 1974 under the majority runoff procedure. In 1980, he ran for reelection but lost in a runoff.

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Recognizing that they lack proof of discriminatory purpose in connection with the adoption of these election procedures, the Plaintiffs contend that the board's failure to change the procedures since 1971 despite complaints from minority groups is evidence of an intent to discriminate. The Court finds that the evidence in this regard is, if anything, to the contrary. On October 22, 1976, the board adopted a resolution calling for a referendum on the question whether trustees should be elected at large or by single-member districts (Plaintiffs' Exhibit 145). The referendum was held in 1977, and 53 percent of those voting approved the idea of single-member districts. On May 10, 1977, the board's attorneys and the school administration were directed to develop a plan for the implementation of single-member districts (Plaintiffs' Exhibit 148). The catch was that the Texas Education Code at that time required the election of school board members from the district at large. n4 Section 23.024 of the Texas Education Code, which authorizes the El Paso Independent School District to elect trustees by single-member districts did not become effective until August 29, 1983. By that time, Plaintiffs had already instituted this suit. n5 In short, the record fails to substantiate the Plaintiffs' claim that the school board's inaction since 1971 is indicative of discriminatory intent. The Court must find in favor of the Defendants with respect to the Plaintiffs' constitutional claims, and then turn to the claims asserted under the Voting Rights Act.-----

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n4 The Texas legislature had enacted legislation which permitted the election of school trustees from single-member districts only in Dallas and Houston.

n5 The Plaintiffs' original complaint was filed June 27, 1983.

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In an amended answer submitted just before trial, and in the agreed pretrial order, the Defendants contend that the 1982 amendment to Section 2 of the Voting Rights Act is unconstitutional. The Court also permitted the Texas Association of School Boards to file an amicus curiae brief in which the constitutionality of the 1982 amendment is questioned. In light of these challenges to the constitutionality of the Act, notice was given to the Attorney General of the United States pursuant to 28 U.S.C. § 2403(a) and the Attorney General has filed a brief in support of the constitutionality of the 1982 amendment. Fortunately, this issue is greatly simplified by the decision of the United States Court of Appeals in *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir.1984), in which the constitutionality of the 1982 amendment to Section 2 of the Voting Rights Act is specifically [*806] upheld. Following binding Fifth Circuit precedent, this Court also holds that the 1982 amendment to Section 2 of the Voting Rights Act is constitutional.

In amending Section 2 of the Voting Rights Act in 1982, Congress reacted to the decision of the Supreme Court in *City of Mobile v. Bolden*, supra, by substituting a "results test" for the prior requirement that discriminatory purpose be shown. *Velasquez v. City of Abilene, Texas*, 725 F.2d 1017, 1021 (5th Cir.1984); *Jones v. City of Lubbock*, supra. Under the amended Act, electoral practices and procedures that create discriminatory results are prohibited, even though the governmental body in question did not install or maintain the electoral practice or procedure for the purpose of discrimination. *Jones v. City of Lubbock*, supra. As stated in the Senate Report on the 1982 amendment:

The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system or practice in order to establish a violation. Plaintiff must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

S.Rep. No. 417, 97th Cong., 2d Sess., 1982 U.S.Code Cong. & Ad.News at 177, 205. As amended, HN4Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, reads as follows:

The first factor to be considered is whether past official discrimination has affected the right of Mexican-Americans to register, vote, or otherwise to participate in the political process. In this connection, two forms of past discrimination stand out: the poll tax and the English language ballot. It is now well established that, prior to the repeal of the poll tax, the requirement that citizens pay a poll tax as a prerequisite for voting eligibility impacted heavily upon persons in the lower income group, which in terms of El Paso County meant predominantly Mexican-Americans. The effect of the poll tax requirement lingered on even after its repeal, and in part has accounted for the lower level of Mexican-American voter registration. See *Graves v. Barnes*, 378 F. Supp. 640, 656 (W.D.Tex.1974). Furthermore, until recent years, all ballots were printed exclusively in English, and this tended to deter voting by Mexican-American voters who did not understand the English language. See *Graves v. Barnes*, supra. These past discriminatory practices still contribute to some extent to the fact that Mexican-Americans register and vote in lower percentages than eligible Anglo voters.

The next factor to be considered is whether voting in the elections of the school district is racially polarized. **The evidence adduced at trial establishes clearly that voting in school district elections tends to be highly polarized along ethnic lines.** The Plaintiffs' expert witness, Dr. Robert Brischetto, conducted a study of 15 school board trustee races between 1974 and 1982 in which one or more Mexican-American candidates opposed one or more Anglo candidates. In 11 of those 15 races, Dr. Brischetto concluded that voting polarization was high. Of the remaining four races, polarization was moderate in two and low in two. In an effort to check his findings with respect to the school board races, Dr. Brischetto also analyzed 12 races for El Paso Community College trustees and six races for city councilman positions. He found high voting polarization in eight of the 12 Community College races, and in four of the six city council races. Although not

directly in point, these latter findings do tend to substantiate Dr. Brischetto's conclusion that voting in the school board elections, as well as other elections conducted in El Paso County, is highly polarized along ethnic lines. Another political scientist who testified for the Plaintiffs, Dr. Rodolfo De La Garza, had conducted studies of Mexican-American voting patterns in El Paso County, and he concluded that ethnicity was the largest single determining factor in most elections conducted in El Paso.

Even more persuasive to the Court than the testimony of the expert witnesses, however, was the testimony of the practical [*808] politicians n6 who are thoroughly familiar with voting behavior in El Paso County. These witnesses testified unequivocally that bloc voting by Mexican-Americans for Mexican-American candidates and by Anglos for Anglo candidates is a political fact of life in El Paso, and one with which all candidates must deal in plotting their respective campaign strategies.

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n6 These included State Representative Paul Moreno, District Judge Edward Marquez, City Council Member and former County Clerk, Alicia Chacon, and Mrs. Margarita Blanco, a woman who has campaigned for many candidates in various political races over the past 30 years.

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The Defendants attempted to counter the evidence presented by the Plaintiffs with respect to voting polarization with the testimony of Dr. William Wachtel, a statistician with no prior experience in analyzing election results or studying voting polarization. Dr. Wachtel analyzed the same elections studied by Dr. Brischetto, but used a different methodology in that he tried to detect the presence or absence of polarization by studying the votes cast for each candidate separately, rather than grouping all Anglo candidates and all Mexican-American candidates involved in the same school board race. Dr. Wachtel's methodology is obviously inferior to that used by Dr. Brischetto, and would have a tendency to produce distorted results. It is interesting to note, however, that even Dr. Wachtel's analysis revealed significant voting polarization along ethnic lines. n7

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n7 Dr. Wachtel found high polarization in the votes cast for 11 of 33 school board candidates and nine of 21 city council candidates.

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In summary, the Court finds from the evidence that polarization is a well-known and well-understood phenomenon in all political races in El Paso County, including school board races, and that the ethnicity of a candidate is one of the most important factors in determining voter preference.

The Court must next consider the extent to which the present scheme for electing school board trustees (at large, by place, majority runoff, nonpartisan election) enhances the opportunity for discrimination against Mexican-Americans. There can be little doubt from the evidence that the present at large system places Mexican-Americans at a significant disadvantage in electing candidates to the position of trustee for the El Paso

Independent School District. The vast size of the district, and its large population, render it almost impossible for a candidate to rely solely upon a door-to-door or person-to-person campaign. Traditional forms of political advertising (e.g. billboards, mailings, news media advertising) are very expensive, and it is difficult for Mexican-Americans, who generally represent a lower-income group, to raise funds necessary for an adequate district wide campaign. Furthermore, the lack of access to campaign funds is not alleviated in school board races by the presence of a political party or even a slating organization; elections are nonpartisan and there is no slating process in the true meaning of that term. These disadvantages are greatly enhanced by the other features of the school district's electoral system, to wit: staggered terms, filing by numbered positions, and majority runoff. Staggered terms and numbered positions (by place filing) tend to create head-to-head races and to promote majority-minority confrontation. *Rogers v. Lodge*, supra, 458 U.S. at 627, 102 S. Ct. at 3280; *City of Rome v. United States*, 446 U.S. 156, 185 n. 21, 100 S. Ct. 1548, 1566 n. 21, 64 L. Ed. 2d 119 (1980); *Jones v. City of Lubbock*, supra. The majority runoff provision has the natural effect of enhancing the underlying tendency toward ethnic polarization, and gives a great advantage to Anglo candidates to the detriment of minority candidates. *Rogers v. Lodge*, supra 458 U.S. at 627, 102 S. Ct. at 3280; *Jones v. City of Lubbock*, supra. Taken in combination, the by-place and majority runoff requirements effectively prevent single shot voting. Furthermore, the absence of any subdistrict residency requirement has contributed to the fact that no person residing in any of the South El Paso precincts that have the heaviest concentration of Mexican-American [*809] residents has ever been elected to the position of trustee of the El Paso Independent School District. When the present at-large by-place majority runoff nonpartisan election scheme is considered in conjunction with the history of official discrimination and the pattern of polarized voting, the conclusion is inescapable that Mexican-Americans have less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice to the school board.

The next factor to be considered is whether there is a candidate-slating process in connection with school board elections, and, if so, whether Mexican-Americans have been denied access to the slating process. The Court finds from the evidence that no slating process exists. A good illustration of the kind of "slating process" meant by Congress is found in *Velasquez v. City of Abilene, Texas*, supra, in which the Court of Appeals describes the organization known as Citizens for Better Government. This organization is identified as "a white-Anglo-dominated slating organization which exercises nearly complete control over Abilene's city politics through its endorsement and support of candidates." *Velasquez v. City of Abilene, Texas*, supra at 1019. Nothing even remotely resembling the Citizens for Better Government exists with respect to school board elections in the El Paso Independent School District. In fact, the evidence does not indicate the existence of any slating organization, effective or ineffective, in connection with school board elections.

The Plaintiffs argue that an informal slating process exists in the sense that vacancies which occur on the board of trustees between elections are filled by vote of the remaining incumbent trustees, and the persons so appointed then run for election as incumbents.

Whatever this procedure may be called, however, it stretches the English language beyond its limits to call it a "slating process." By the same token, it is not a slating process for an incumbent trustee to contact his friends and to encourage them to run for vacancies on the school board. Finally, if either of these procedures could be termed a slating process, the evidence is clear that the process is open to Mexican-Americans as well as to Anglos. This fact may be illustrated by two specific examples: (1) Arturo Aguirre testified that he was appointed to fill an unexpired term and ran for election the following year as an incumbent; and (2) Javier Montes testified that he was contacted by Elman Chapa, a friend from the Bowie High School Alumni Association, and encouraged to run for a vacant position in 1970. To make a long story short, the evidence simply does not support the Plaintiffs' half-hearted claim of the existence of a slating process, and, if there is a slating process, it is obviously open to Mexican-Americans. n8

- - - - - Footnotes - - - - -

n8 In a brief filed after the trial's conclusion, the Plaintiffs attempt to bolster their claim as to the existence of a slating process by quoting from deposition testimony not offered in evidence (Plaintiffs' posttrial brief, pp. 15-17). The proposition that the Court may not consider any evidence that is outside the record would seem to require no further elaboration.

- - - - - End Footnotes- - - - -

The Court must next consider the extent to which Mexican-Americans within the El Paso Independent School District bear the effects of discrimination in the areas of education, employment and health, which hinders their ability to participate effectively in the political process. There can be no question that in past years there was discrimination against Mexican-Americans in the areas of employment and education. n9 Past discrimination in these areas is partly responsible for the findings made earlier in this opinion to the effect that Mexican-Americans historically occupy a lower economic status, that many are not proficient in the English language, and that Mexican-Americans tend to register and to vote in lesser numbers than their Anglo counterparts. The trial record is insufficient to [*810] permit the Court to make findings over and above these generalizations. For example, there is no evidence of any present discrimination against Mexican-Americans in the field of education. On the contrary, the El Paso Independent School District is doing an admirable job, considering its limited financial resources, of furnishing a quality education to all students within the school district, 70 percent of whom are Mexican-American. Furthermore, although there was testimony concerning unusually high rates of unemployment in the areas of South El Paso which have the highest concentration of Mexican-American population, the record fails to show how many of those affected by unemployment are recent immigrants or resident aliens as opposed to citizens. The evidence also fails to show how many residents of South El Paso were educated (or not educated) in Mexico rather than in the United States.

- - - - - Footnotes - - - - -

n9 No evidence was presented which would indicate discrimination against Mexican-Americans in the area of health. Plaintiffs apparently make no contentions along those lines.

- - - - - End Footnotes- - - - -

The next factor to be considered is whether political campaigns for the office of trustee have been characterized by overt or subtle racial appeals. Mrs. Maxine Silva, a candidate for trustee in the 1948 school board election, testified that during her campaign she received telephone calls in which she was accused of being a "wet-back," and subjected to other ethnic slurs. The Court accepts the testimony of Mrs. Silva, and finds it to be quite credible. It was her further testimony, however, that times have changed, and that the same atmosphere does not exist today. In fact, Mrs. Silva is again a candidate for trustee in the 1984 school board election. The other evidence offered by the Plaintiffs in this regard is much less convincing. For example, one Felipe Peralta, testified that he was a victim of ethnic appeals and slurs as a candidate for trustee in 1970. However, the winning candidate in that school board race was Javier Montes, a Mexican-American, who received approximately 3,500 votes to Peralta's 800. The claim is also made that in the 1972 school board election, two candidates, Jose Pinon, Jr. and Cleofas Calleros, were defeated on the basis of their ethnicity. What the testimony as a whole actually reveals, however, is that the news media and the public identified both candidates with an organization called MECHA, a group of militant college students that was in the process of conducting demonstrations on the campus of the University of Texas at El Paso. It must be remembered that 1972 was the year of the Nixon-McGovern landslide, and that being perceived by the public as a "radical" probably would have occasioned the defeat of any candidate in any race in any district in the United States in that particular year. The Court is unable to find in the record any concrete evidence of any "racial appeals" as such in connection with the campaigns of these two candidates. The Court is also persuaded by the testimony of another witness for the Plaintiffs, Judge Edward Marquez, who testified that he had observed every election in El Paso since 1960, and that the only race in his memory that involved ethnic appeals was the election of El Paso Community College Trustees in 1976. That election, of course, had no relation to the El Paso Independent School District.

Finally, the Court must take into consideration the extent to which Mexican-Americans have been elected to office in the El Paso Independent School District. The Defendants offered evidence that, since 1950, seven of the 28 trustees, or 25 percent, have been Mexican-Americans. This statistic is somewhat misleading, in that one of the seven Mexican-Americans, Mr. Emilio Peinado, was appointed to fill a vacancy on the board in 1960, and resigned in 1963 without having run for election. Although the percentage of Mexican-Americans that have been elected to the school board is somewhat less than the percentage of registered voters who are Mexican-American, the difference is not great enough to be significant in and of itself. However, it does have a tendency to verify the earlier finding that Mexican-Americans find it more difficult than Anglos to be elected to the school board.

Two other factors which have limited relevance, but which the Court may consider, are whether there is a lack of responsiveness on the part of school trustees to the [*811] particularized needs of Mexican-Americans, and whether

the policy underlying the present at-large election system is tenuous. Taking the second factor first, the Court finds that the policy is certainly tenuous in light of the 1977 referendum vote in favor of single-member districts, which presumably reflects the opinions of the majority of voters within the school district, and the 1983 action of the Texas Legislature in authorizing single-member districts for school districts the size of the El Paso Independent School District. These two facts combined make it difficult to justify the continuation of the at-large election system even on the basis of political theory, quite apart from consideration of minority-voting rights.

With regard to the element of responsiveness, the Plaintiffs make much of a previous decision styled *Alvarado v. El Paso Independent School District*, 426 F. Supp. 575 (W.D.Tex. 1976), affirmed 593 F.2d 577 (5th Cir. 1979), in which the Court found that the El Paso Independent School District had discriminated against Mexican-American students in certain respects. Most of the events involved in that law suit, however, occurred before 1970, and they are not part of the present board of trustees. On the contrary, the Court has already found earlier in this opinion that the El Paso Independent School District is presently doing a commendable job of furnishing educational services to Mexican-American students. For example, the El Paso Independent School District was a pioneer in bilingual education, developing a comprehensive program in the early 1970s financed entirely with local funds prior to the enactment of any legislation by the State of Texas. Furthermore, the district has taken affirmative action to recruit qualified Mexican-American teachers for the school system, and has promoted those who have shown leadership ability to supervisory positions such as school principals. Teachers employed by the school district have been encouraged to go back to college and to obtain master's degrees with specialization in the area of counseling minority students. The evidence further shows that achievement test scores recorded by Mexican-American students have improved markedly in the last few years. Since 45 percent of the districts' 60,000 students come from families who are classified as "impoverished," the school district carries out the largest school lunch, breakfast, and milk programs in the State of Texas. Although these programs are funded with federal funds, the school district must administer them for the benefit of the students. Finally, a program of the school district that has particular relevance to this case is the practice of causing high school principals to be deputized as voting registrars, and emphasizing the registration of students who become 18 years of age while attending high school. Since two-thirds of the high school students in the district are Mexican-American, the result will be the registration of more Mexican-American voters. In summary, the Court is unable to find any evidence of a present lack of responsiveness by the school board to the particularized needs of Mexican-Americans.

The Voting Rights Act requires that the totality of the circumstances be considered in determining whether a particular system of electing public officials results in the denial to a particular class of citizens of equal opportunity to participate in the political process and to elect representatives of their choice. In

the instant case, the present at-large, by-place, majority runoff, nonpartisan election of school board trustees does tend to deprive Mexican-Americans of an equal opportunity to elect candidates of their choice. This finding is based primarily upon the consideration of the first three factors, to wit: (1) historical discrimination of an official nature that affected the exercise by Mexican-Americans of their rights to register and vote; (2) the high degree of voter polarization along ethnic lines in elections conducted by the El Paso Independent School District; and (3) the extent to which the at-large, by-place, majority runoff, nonpartisan election procedure enhances the difficulties [*812] faced by a Mexican-American candidate seeking election to the position of school board trustee. It is not without significance that, at the present time, and for the last four years, a school district, of which 70 percent of the students are Mexican-American,] of which over 50 percent of the residents are Mexican-American, and of which 43 percent of the registered voters are Mexican-American, has had only one trustee out of seven who is of Mexican-American descent. Although the other factors listed by Congress must be considered, and although each has been considered in this opinion, the Court's findings with respect to the first three factors in combination inescapably point to a result which violates the Voting Rights Act as amended in 1982. Therefore, judgment must be entered in favor of the Plaintiffs, and the Defendants must be ordered to implement single-member districts in place of the present at-large scheme.”

In a challenge to the 1980 Texas House of Representative redistricting plan LULAC and other Latino advocacy groups used some of the evidence developed for the *Sierra* case to demonstrate to the Department of Justice that the redistricting plan adopted by the State was retrogressive in El Paso because it did not provide districts with sufficient Latino population concentration to afford the Latino population an opportunity to elect candidates of their choice. Latino advocacy groups and Latino voters also complained that the plan eliminated a Latino majority district in Bexar County, Texas (San Antonio). As a result the Department of Justice objected to the plan for El Paso and Bexar Counties and in an enforcement action the United States District Court order modifications to the plan that lead to the restoration of an additional Latino majority district in Bexar County and to modifications in the El Paso districts that increase Latino population concentrations to levels that allow the Latino voters to elect candidates of their choice. [need citation]

In *Arriola v. Harville*, 781 F.2d 506 (5th Cir. 1986) Appellant filed suit under the Voting Rights Act of 1965, 42 U.S.C.S. § 1973c, seeking an injunction to prevent appellee county judge and Jim Wells County from conducting further elections under a plan which was rejected by the Justice Department. The district court issued the injunction.

In *LULAC v. Texas*, 113 F.3d 53 (5th Cir. 1997) Appellant citizens' organization brought action against appellee state under § 5 of the Voting Rights Act (VRA), 42 U.S.C.S. § 1973c, contending that a Texas supreme court decision on the propriety of a

special election when a state court judge resigned constituted a change in state election laws without obtaining preclearance. The court reversed the dismissal of appellant citizens' organization's action and remanded for the convening of a three-judge court. Appellant's claim that appellee state had adopted an election law change was not wholly insubstantial and could not properly be dismissed by a single judge.

III. Findings of Racial and Ethnic Discrimination By the Department of Justice

The Following are a series of excerpts from findings by the Department of Justice in Voting Rights Objection Letters. This involves the period 1997 through 2005. All Justice Objection Letters are available on line.

Some of the Objections involve local areas including issues such as annexation which were determined to be racial. Others are regional or state wide including adoption of procedures that frustrate the minority electorate—quite literally preventing the election of appellate judges of their choice. Still others involve state wide redistricting in 2002 which was drawn by the entirely Republican State Legislative Redistricting Board. ^{1/}

To some it is significant that the first step in Tom Delay's plan to take over the Texas Legislature was found by the Bush Department of Justice to pack and crack minority voters into districts which appeared intentionally to dilute minority voting power and frustrate opportunities to elect representatives of their choice. ^{2/}

^{1/} Section 5 of the Voting Rights Act of 1965 (as amended) 42. U.S.C. Sec. 1973 c et seq. requires that all electoral jurisdictions in Texas and all or parts of several other states with a vivid history of racial and ethnic discrimination prove that changes in election procedures are not intended to or have the effect of further minority discrimination **before** enforcing ths changes. This proof is usually made in an administrative action handled by the Voting Section of the Civil Rights Division of the Department of Justice. However, all jurisdictions have an alternative of filing a declaratory judgment action in the District Court for the District of Columbia. When a jurisdiction is unable to convince the Department of Justice that the election change does not discriminate a “so called” **Objection Letter** is sent to the jurisdiction. These “Letters” are findings of fact and applications of law. All of the letters interposed since January 1, 1997 are available on the world wide webb. This document edits and excerpts some of those letters but the full letters can be found at:
http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm.

^{2/} Lest it appear that there good Democrats and Bad Republicans in the process, it is important to point out that similar objections and litigation against Democratic dominated redistricting in the 1970s through the late 1990s was likewise found to dilute minority voting strength. The sad truth is that there is no party which has not discriminated when given the chance. This is perhaps the best argument for the need to continue Section 5 coverage. There is not a significant difference in the effect/affect of the process in 1970s which convinced Congress to cover Texas and the partisan/racial debauch which marked the 2005 redistricting.

Section 5 speaks truth to power. In some cases the speech is more pointed in others but the rule of law that each person's vote should have the same is established by Section 5. Until states such as Texas can demonstrate some recovery from the illness of racial prejudice in the election process removal of Section 5 would just open up the process to the same old crowd which has so sadly dominated Texas.

Baytown, Harris County Texas

Annexations were one of the primary problems we complained about in 1974. which convinced Congree that

An attempt to dilute minority voters at basis of decision to annex a heavily Anglo area but not to annex a nearby minority community.

March 17, 1997

Randall B. Strong, Esq.
503 Ward Road
Baytown, Texas 77520

Dear Mr. Strong:

This refers to two annexations (Ordinance Nos. 95-13 and 95-33) to the City of Webster in Harris County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our May 3, 1996, request for additional information on January 15 and March 11, 1997; supplemental information was received on March 5, 1997.

[matter omitted]

We have considered carefully the information you have provided, as well as Census data, and comments and information from other interested parties. According to the 1990 Census, Hispanic residents constitute 19 percent and black residents constitute 5 percent of the city's total population, and 17 and 4 percent, respectively, of the voting age population. The annexation in Ordinance No. 95-33 adds approximately 1,162 persons to the city's total population, all of whom appear to be white. Thus, the proposed annexation will reduce the city's Hispanic proportion to 15.0 percent and the black proportion to 4.2 percent of the total population.

Our analysis indicates that there is a residential area adjacent to the city limits that if annexed, would have lessened the impact of annexing the all-white area included in Ordinance No. 95-33. This area is to the northeast of the city and is located within Census

Block 101B of Tract 037304. This block has a significant minority population percentage: Hispanic persons constitute 39 percent and black residents constitute 7 percent of the total population. According to information provided by the city, the annexation of Block 101B alone would have increased the city's Hispanic population to 20.2 percent and the black population to 5.3 percent of the total.

The city has offered several reasons for its refusal to annex Block 101B. First, it alleges that it was unaware that Block 101B had a significant minority population at the time it was considering its 1995 annexations and that its racial/ethnic composition did not play a role in the city's annexation decisions. Our analysis, however, revealed that during the annexation process, the Hispanic councilmember and another leader of the Hispanic community opposed the annexation contained in Ordinance No. 95-33 indicating that if the city was going to annex the all-white residential property in Ordinance No. 95-33, it should also annex the residential property contained in Block 101B. They requested city officials at a planning and zoning meeting and at council meetings to consider annexing Block 101B, but their requests were refused.

Although there is some dispute regarding whether the city manager, who is central in deciding which areas will be considered for annexation into the city, actually stated that the reason Block 101B would not be annexed was because of its ethnic composition, conversations between the city manager and at least two city councilmembers tend to corroborate that this was indeed the city manager's view. Given the role of the city manager in the city's annexation process, and the concerns expressed to city officials by representatives of the minority community regarding the city's failure to include Block 101B in the annexation, the city's assertions that it was unaware of the racial/ethnic make-up of Block 101B at the time of the 1995 annexation is at best disingenuous.

Second, the city argues that Block 101B could not be annexed because it is in a track of land that straddles the extraterritorial jurisdiction ("ETJ") of the city. Our analysis revealed that Block 101B is clearly within the city's ETJ line and that the city's failure to annex the area could not be explained satisfactorily on this basis.

Third, the city claims that the population from Block 101B would place a strain on city services that would be too great for the city to absorb, and that unlike the area annexed by Ordinance No. 95-33, Block 101B would not generate enough revenue to cover the cost of extending services thereto. The city maintains that an important consideration in determining whether to annex a particular parcel of land is the city's assessment that the revenues generated from the area will offset the cost of providing municipal services to it. With regard to Ordinance No. 95-33 and Block 101B, however, no specific data or precise information regarding anticipated revenues or costs for municipal services was provided by the city in support of its position. Information we obtained from city officials and municipal records indicates that the cost of providing services to Block 101B would not be any more, and might even be less, than the cost of providing services to the area annexed by Ordinance No. 95-33.

Fourth, the city also alleges that annexing the area included in Ordinance No. 95-33 would serve to clarify the city's northern boundaries between it and the City of Houston by creating an easily distinguishable boundary. Information contained in city documents and provided by city officials clearly indicates that annexing Block 101B would have enabled the city to use a major thoroughfare, El Camino Real, as a continuous, and easily distinguishable boundary line for the northeastern part of the city. The failure to include Block 101B leaves the city with an irregular boundary in the north.

Finally, the city suggests that the area contained in Ordinance Nos. 95-13 and 95-33 were more desirable than Block 101B because of their profitability. Although our investigation indicates that it is likely that the area annexed by Ordinance No. 95-33 will generate more revenue than Block 101B, no information has been presented by the city to suggest that annexing Block 101B would create a deficit in the city's budget because Block 101B has an insufficient tax base to cover the cost of the additional services it will need. Moreover, even though it appears that the area annexed by Ordinance No. 95-33 has the ability and/or the potential to provide the city with greater revenues than Block 101B, the fact that the other area the city annexed in 1995 is vacant and will generate no revenue unless and until it is developed suggests that generating revenue could not have been the city's only motivation in deciding not to annex Block 101B. In fact, as stated above, with regard to the annexation of areas other than Block 101B, the city seems most concerned that the revenues generated by the property simply offset the cost of providing municipal services to it.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). To demonstrate the absence of a discriminatory purpose with respect to an annexation, a jurisdiction must demonstrate that the revision of municipal boundary lines to "includ[e] certain voters within the city [while] leaving others outside," was not based, even in part, on race. *Perkins v. Matthews*, 400 U.S. 379, 388 (1971). See also *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987).

The following facts weigh heavily here in our assessment regarding whether the city's burden has been met: (1) the city failed to annex an area with a significant minority population, while it was simultaneously annexing an all-white area that when added to the city's population will reduce the minority proportion; (2) the city deviated from what appears to be its primary annexation consideration in deciding not to annex Block 101B (i.e., that the cost of providing municipal services not be outweighed by the revenues anticipated from the annexation); (3) the city failed to achieve its purported objective of establishing an easily distinguishable boundary in the north in undertaking the annexation in Ordinance No. 95-33. This objective would have been more fully realized, however, had Block 101B been annexed; and (4) the city in the decision-making process appears to have been apprised by representatives of the minority community of their concerns about excluding from the city the population that resides in Block 101B, but, contrary to these

concerns, voted in favor of annexing only the all-white area included in Ordinance No. 95-33.

Additionally, the information available to us suggests that the city's agent in determining which areas were eligible for annexation consideration refused to consider Block 101B for annexation because of the racial/ethnic background of the persons who reside in the area. Thus, significant questions persist regarding a lack of even-handedness in the city's application of its annexation policy and the city's annexation choices appear to have been tainted, if only in part, by an invidious racial purpose. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983); *City of Rome v. United States*, 446 U.S. 156, 172 (1980). An annexation or any other voting change adopted for racial reasons, however, can have no legal effect under Section 5. *City of Richmond v. United States*, 422 U.S. at 378.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the annexation contained in Ordinance No. 95-33. We note under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the objection by the Attorney General remains in effect and the annexation continues to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10, 51.11, 51.45, and 51.48(c) and (d).

A Change in the Procedure of replacing Appellate Justices who have left the bench usually as a result of death or resignation. In a letter sent to Alberto Gonzales then Texas Secretary of state and now U.S. Attorney General:

“Instead of seeking input from Hispanic voters with regard to potential judicial appointees, the governor [George W. Bush] selected an Anglo appointee who had been rejected by the majority of the voters in that district in an earlier election in favor of a Hispanic candidate. Had the vacancy been filled by election, rather than by gubernatorial appointment, Hispanic voters in the fourth court of appeals district would have had an opportunity to elect a candidate of choice rather than having a judge for the past two years appointed to that seat who was not their choice. Thus, the Angelini appointment is illustrative of the effect the proposed change may have on the participation opportunities of Hispanic voters.”

September 29, 1998

The Honorable Alberto R. Gonzales
Secretary of State
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to the change in the procedures for filling certain vacancies in judicial offices from election to appointment in the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our June 1, 1998, request for additional information on July 31, 1998. Supplemental information was received on August 3 and 27, 1998.

According to the 1990 Census, the State of Texas has a total population of 16,986,510 persons, of whom 25.6 percent are Hispanic and 11.6 percent are black. The Hispanic share of the voting age population is 22.4 percent and the black share of the voting age population is 11.0 percent. The state has fourteen court of appeals districts, three (4th, 8th, and 13th) of which have majority Hispanic population percentages (55, 56, and 63 percent Hispanic, respectively). There are no majority black court of appeals districts. Sixty eight of the state's 396 district courts are majority minority districts; of these, thirty-seven district courts have majority Hispanic voting age population percentages, but none have majority black voting age population percentages.

Our analysis indicates that under the proposed change, it is unlikely that judicial vacancies in districts with significant Hispanic voting age and/or registered voter populations will be filled in a manner that reflects the preferences of Hispanic voters commensurate with the opportunity available to those voters if the vacancy was filled by election. The governor is elected at large, by a statewide electorate in which Hispanic voters are a minority. Because the governor's constituency is substantially different than that in districts with significant Hispanic population percentages and because voting in Texas often is **polarized along racial lines**, voters in these districts will not have an opportunity to participate in the selection of judges under the new system similar to the opportunity they have under the current system. Moreover, there does not appear to be any mechanism or safeguard built into the judicial appointment process to allow for input from Hispanic voters, or a consistent procedure for soliciting the minority community's views with regard to potential judicial candidates.

The judicial appointment made to the fourth court of appeals district pursuant to the Hardberger decision fully demonstrates the impact of the proposed procedure on Hispanic participation opportunities. Instead of seeking input from Hispanic voters with regard to potential judicial appointees, the governor selected an Anglo appointee who had been rejected by the majority of the voters in that district in an earlier election in favor of a Hispanic candidate. Had the vacancy been filled by election, rather than by gubernatorial appointment, Hispanic voters in the fourth court of appeals district would have had an opportunity to elect a candidate of choice rather than having a judge for the past two years appointed to that seat who was not their choice. Thus, the Angelini appointment is illustrative of the effect the proposed change may have on the participation opportunities of Hispanic voters.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973); *Procedures for the Administration of Section 5*, 28 C.F.R. 51.52. We recognize that the state supreme court, faced with the constitutional issues raised in the Hardberger litigation, was required to render a decision regarding the proper interpretation of state law. The state, however, has not suggested that it was prevented by the court ruling in the Hardberger litigation from providing Hispanic voters in the fourth court of appeals district meaningful input into the appointment process, which might well offset the diminution in electoral opportunity resulting from the change in vacancy filling procedure. Thus, while the state has met its burden with regard to purpose, we cannot say that the state has met its burden of showing that, in these circumstances, the change in vacancy filling procedure from election to appointment will not "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the change in the procedure for filling prospective judicial vacancies.

A Deannexation in Lamesa of an area which would have contained significant latino residents.

July 16, 1999

Mr. Robert Gorsline
City Secretary
601 South First Street
Lamesa, Texas 79331

Dear Mr. Gorsline:

This refers to the deannexation by referendum of property previously annexed under Ordinance No. O-06-98, and an annexation (Ordinance No. O-05-99) for the City of Lamesa in Dawson County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our April 5, 1999, request for additional information regarding the deannexation on April 27, 1999, and your submission of the 1999 annexation on May 20, 1999.

The property that is the subject of the deannexation was annexed in 1998 and received Section 5 preclearance on December 8, 1998. The owner of the property specifically sought annexation to obtain the necessary city services and rezoning which would permit the construction of a 72-unit apartment complex for occupancy by moderate to low income families. Other assisted housing for the elderly, including housing built by the same developer, already existed in this area, and had apparently been proposed and built with little accompanying controversy. We understand that this housing contains few, if any, minority residents.

According to 1990 Census data, Hispanics and blacks constituted 51 percent of the city's population. Had it not been for the deannexation by referendum, the area annexed by Ordinance No. O-06-98 and its future residents would have become part of City Council District 6, which, according to the 1990 Census, has by far the lowest percentage of minority residents (7 percent) in the city. While it is difficult to predict with certainty the racial and ethnic makeup of the future residents of the proposed housing project, the income limits for occupancy of this housing, considered in light of existing socioeconomic characteristics of the population in Lamesa and Dawson County, indicate that the future residents would more likely reflect the minority percentage of the city as a whole than the minority percentage of District 6.

It appears that elected city officials originally welcomed the request for annexation and the proposed development because of a generally recognized need for additional housing in the city.

Almost immediately, however, the annexation and the proposed development became the subject of intense opposition, led principally by residents of District 6. Opponents of the project appeared at public hearings regarding the annexation and the proposed rezoning of the property to voice their objections.

Following the city council's approval of the annexation and rezoning ordinances, the opponents presented sufficient petitions under the city's referendum procedure to force the council to repeal the ordinances or put them to a citywide vote. At the subsequent referendum election, the voters repealed the ordinances.

The minutes of public meetings and hearings and contemporaneous newspaper articles report on various statements made by the opponents of the project. We have closely examined this public record of statements made by opponents of the development for legitimate non-racial arguments why the annexation and the rezoning ordinances should not be approved. We note that a significant number of opponents' statements were based on who the proposed occupants would be, and included such terms as "undesirables," "HUD people," "Section 8 people," and "criminal activity that could come from this project." Other opponents stated that they would not oppose the annexation if the development was for elderly housing instead of low to moderate income housing. To be sure, there were other asserted grounds for opposition which were not directed at the prospective tenants (e.g., concerns over flooding or reduced water pressure), but no information has been provided which indicates that these potential problems could not have been dealt with effectively by the city or the developer.

After a Federal District Court ordered Galveston to adopt a single member district plan, the City attempts to modify it so as to reintroduce procedures to frustrate minority voting rights. One of the concerns that everyone in Texas has is that if the protections of the Federal Voting Rights Act were removed, jurisdictions would begin to backslide. This would likely be increasingly true as the minority population continue to rise and their political fortunes increase.

December 14, 1998

Barbara E. Roberts, Esq.
City Attorney
P.O. Box 779
Galveston, Texas 77553-0779

Dear Ms. Roberts:

This refers to amendments to the city charter that provide for a change in the method of election for the city council from six single-member districts to four single-member districts and two at large with numbered posts, a change from a plurality to a majority vote requirement, redistricting criteria and revised recall procedures for the City of Galveston in Galveston County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our August 17, 1998, request for additional information on October 15, 1998.

We have carefully considered the information you provided, as well as Census data, and information in our files and from other interested parties. According to 1990 Census data, the city's total population is 28 percent black and 21 percent Hispanic. Under the existing system, six councilmembers are elected from single-member districts and the mayor is elected at large. Two of the single-member districts have black population majorities and have elected black representatives to the city council. This method of election and districting plan were adopted in settlement of a vote dilution lawsuit filed by minority residents against the city *in Arceneaux v. City of Galveston*, No. G-90-221 (S.D. Tex.), and received preclearance under Section 5 for use on an interim basis on April 29, 1993, and for use on a permanent basis on January 27, 1994.

Prior to the adoption of a single-member district method of election, the city sought preclearance for a method of election similar to the plan currently under review. It provided for the election of four councilmembers from single-member districts, two councilmembers elected at large by numbered position and the mayor elected at large with a plurality vote requirement. This 4-2-1 method of election was proposed as a replacement for the at-large method of election that was the subject of the vote dilution lawsuit. On December 14, 1992, the Attorney General precleared the use of a plurality vote requirement, but interposed an objection under Section 5 to the proposed 4-2-1 method of election and to the use of numbered posts for the at-large seats because the city had not met its burden under Section 5 of demonstrating the absence of a discriminatory purpose and effect. Our conclusion in this regard was premised upon a number of factors.

First, our analysis of the at-large system indicated that voting in municipal elections was **racially polarized** and that minority-supported candidates had very limited success under the at-large system. Second, the districting plan that accompanied the 4-2-1 method of election did not include a single district in which black or Hispanic voters constituted a majority of the population; instead, the plan included two districts in which black and Hispanic voters combined constituted a majority. The city failed, however, to provide evidence of cohesion between black and Hispanic voters in municipal elections, rendering it doubtful that either minority group under this plan would elect a candidate of choice to a council seat. Third, the city maintained its preference for the 4-2-1 plan over the opposition of the minority community and the *Arceneaux* plaintiffs, who favored the adoption of a six single-member district plan with two districts in which black voters would constitute a majority of the population. Fourth, the city chose to maintain two at-large positions on the city council, in addition to the mayoral seat, and to add numbered posts. Given the existence of racially polarized voting in municipal elections, **we concluded that these features of the proposed electoral system would limit the ability of minority voters to elect their candidates of choice to the city council.** Finally, given all of the circumstances described above, **we determined that the city had not provided legitimate, nonracial justifications for its choices regarding the 4-2-1 method of election and its adoption of numbered posts. It is against this backdrop that we must view the city's current request for preclearance of the 4-2-1 plan, with numbered posts, as well as the proposed return to the use of a majority vote requirement.**

In light of the Attorney General's prior objection to virtually identical voting changes, and the requirement of Section 5 that the submitting authority carries the burden of demonstrating that proposed voting changes are free of discriminatory purpose and effect -- see 28 C.F.R. 51.52(a) -- we have examined the information provided to determine whether new factual or legal circumstances exist which would lead to the conclusion that voting changes that did not satisfy the nondiscrimination requirement of Section 5 in 1992 will satisfy the same requirement under Section 5 today. Central to our consideration of this issue is the presence today in the City of Galveston of a method of election which fairly reflects minority voting strength, a circumstance which did not exist when the 1992 objection was interposed.

Our examination of city election returns since 1991 indicates that racial bloc voting continues to play a significant role in city elections. This year's mayoral election in which the Hispanic candidate was successful appears to have been an instance where Hispanic and black voters did vote together, along with a number of Anglo crossover voters. However, this cohesion between minority voters appears to have been a departure from the norm, as evidenced by the results in other recent elections. Of particular note is the fact that the proposed majority vote requirement, had it been in effect in this year's election, could well have changed the outcome of the mayoral race since the majority of the votes cast were for candidates favored by the Anglo voting majority. We find it significant that the city has provided no information or analysis in support of the proposed changes regarding racial bloc voting or cohesiveness between black and Hispanic voters, factors which were critical in our 1992 examination of the 4-2-1 method of election and which are no less important today.

While the city council has not yet adopted a redistricting plan for the proposed method of election, we understand that three alternative plans were developed by an appointed redistricting committee and they are currently before the council. We understand that all three plans are based on 1990 Census data and that this data continues to be the most accurate available information on the city's demographics. As was the case in 1992, we are informed that none of these plans provide for a single-member district in which Hispanic persons constitute a majority of the population or more than one district in which black persons constitute a majority. If this information is correct, it would appear to confirm that the proposed method of election, under current circumstances, cannot produce an electoral system that recognizes minority voting strength as fairly as does the current system. Therefore, **the proposed 4-2-1 method of election with numbered posts for the two at-large seats and a majority vote requirement would lead to a retrogression in minority voting strength prohibited by Section 5.** See *Beer v. United States*, 425 U.S. 130, 141 (1976) ("the purpose of . 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"); 28 C.F.R. 51.54.

We have considered the impact of the proposed redistricting criteria on the city's ability in the future to draw districts that fairly recognize minority voting strength. Our analysis has been hampered by the lack of information from the city regarding these criteria and

how they are to be interpreted and applied. For reasons that the city does not explain, these criteria place what appear to be significant restrictions on the ability of the city to draw racially fair redistricting plans. The criteria specify that city districts be drawn from north to south and that districts "be as equal as possible with only minor variations depending upon the streets selected for district boundaries." The latter criterion appears to be significantly more exacting than the plus or minus 10 percent deviation standard approved by the federal courts for local jurisdictions to satisfy the one person, one vote requirement of the Constitution. If we understand these criteria correctly, had they been in effect in 1993 they would not have permitted the existing districts to be drawn, and their future application could hamper the ability of the city to draw nonretrogressive redistricting plans in compliance with Section 5.

Although city officials and members of the charter review committee established in 1997 presumably were aware of the prior history of litigation under the Voting Rights Act and the Attorney General's 1992 objection, the information provided by the city in support of its application for preclearance of the instant changes contains remarkably little acknowledgment of these past events or their relevance to our review under Section 5 of the city's preclearance request. For example, the city council, which appointed the charter review committee, apparently provided little direction to the committee regarding factors that should be considered in proposing changes that would affect voting, such as whether its proposals complied with Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and satisfied the nonretrogression standard of Section 5. **In response to a specific inquiry on this subject, you informed us simply that "the Charter Review Committee did not discuss in depth the Attorney General's 1992 objection." These facts, viewed in light of the position adopted by the council before the committee began its work that it would put before the voters any proposed charter change approved by a majority of the committee, support an inference that the council gave very little independent consideration to the serious voting rights issues implicated by the charter committee's work and the potential impact of its efforts on the political participation opportunities of minority voters.**

A change from at-large elections in the Sealey ISD allowing "so called" single shot voting to a system which prevents it altogether.

June 5, 2000

David Méndez, Esq.

Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel ^{3/}

^{3/} This firm traditionally represented the State of Texas and many of its political subdivisions including Houston from suits by Hispanics and African Americans. The McDaniel in the firm name is Myra McDaniel (an oil and gas attorney from the Midland Odessa area) who was the first African American Secretary of state. She was appointed by Democratic Governor Mark White who himself has been the Secretary of State in

1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

Dear Mr. Méndez:

This refers to the adoption of numbered posts for the Sealy Independent School District in Austin County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our February 14, 2000, request for additional information on April 6 and June 1, 2000; supplemental information from the state was received on June 2, 2000.

We have carefully considered the information you have provided, as well as Census data, information in our files, and information and comments from other interested parties. According to the 1990 Census, 12.7 percent of the school district's total population is black and 15.9 percent is Hispanic. Since 1990, it appears that the school district has experienced growth in its overall population and in the minority share of its population. Minority students within the school district at present constitute a significant percentage of the school district's overall student enrollment (28 percent Hispanic/16 percent black).

Under the existing system, the school district elects its seven-member board of trustees on an at-large basis to three-year staggered terms of office (3-2-2). Only one minority representative, an African American, has been elected to the school board in recent times. After two unsuccessful efforts, this individual succeeded in gaining election when she ran for office in an election year when three trustee seats were up for election. In that contest in 1992 she placed last among the three winning candidates, which was also true of her reelection in 1995. In her two unsuccessful bids for the school board, she, like other minority candidates, appears to have failed to garner sufficient white voter support to get elected under the at-large system.

In our view, the available information concerning voting patterns within the school district is not inconsistent with a pattern of **racially polarized voting**, although it does appear that some minority candidates in the school district and other local elections have received a level of support from white voters, as well as from minority voters, sufficient to gain election. By and large, however, this level of white voter support appears to have been reserved for a very small number of minority candidates. Most minority candidates have been unsuccessful in election contests for at-large seats on the school board, as well as for other local offices when they face white opposition. **Electoral patterns such as these are typically observed in instances where voting is racially polarized.**

The school district now seeks to add to its at-large electoral system a numbered post requirement that, in effect, will convert each election for a seat on the board into a

Texas in 1975 when the Voting Right Act was extended to cover Texas. In that role he was the point man in the unsuccessful effort to convince Congress that it was not needed in Texas. He also was the White in *White v. Regester*.

separate election contest. In these separate contests for school board seats, minority-supported candidates are more likely to be pitted against white incumbents or challengers in "head-to-head" contests. **Where voting is racially polarized, our experience suggests that minority-supported candidates are more likely to lose because they are unlikely to garner a majority of the votes in the bid for a single seat.** Indeed, it appears that the school district's sole minority trustee may not have fared well under the proposed system, given her third place showing in the two successful bids for the board in which she faced white opposition.

The school district maintains, however, that the proposed numbered post requirement will not have a negative impact on minority electoral opportunity for at least three reasons. First, the district asserts that voting within the district is not racially polarized and numbered posts cannot adversely impact minority voters under these circumstances. Second, the district claims that minority voters will not be harmed by the implementation of numbered posts because they do not make use of the technique of "single-shot" voting under the existing system and are too small a share of the voting population to elect on their own a candidate of choice. Hence, the change to numbered posts could not worsen their political participation opportunities. Third, the district posits that the addition of numbered posts will not harm minority voters because under the proposed system, unlike the existing system, white voters will not be able to utilize the technique of "single-shot" voting, which denies minority candidates the white votes needed to gain election under the at-large system.

With regard to the district's first assertion concerning the existence of polarized voting, we have noted above that based on the information available to us there is evidence of such a pattern of voting. We have been unable, however, to conduct a more particularized analysis of the school district's claim in this regard, given, among other things, several deficiencies in the information that has been provided. For example, election returns by voting precinct for school district contests in which minority candidates participated were not provided to us, except for the May 2000 election returns forwarded to us on June 1, 2000. And, the consolidated returns that were provided did not include in several instances the total number of voters who voted in a particular school district election, all of which is important information in the analysis of voting behavior. Finally, no information was provided for elections in which minority candidates participated for municipal offices other than for the City of Sealy.

In support of its argument regarding the absence of polarized voting, the school district relies in large part on the following elections involving minority candidates: 1) the election without opposition of a minority candidate who was first appointed to fill a vacant constable position in Precinct 4 (this candidate also happens to be the husband of the minority school board trustee); 2) the third place election and reelection of the incumbent African-American trustee, who is the only minority to ever serve on the school board; and 3) the election of a single minority candidate to the five-member city council for the City of Sealy, despite numerous unsuccessful candidacies of minority candidates in a city with a combined 1990 minority population share of 38 percent. We are not persuaded that these limited instances of minority electoral success under the

circumstances noted above demonstrate the absence of polarized voting within the school district, given the lack of success generally experienced by minority candidates.

The school district's second claim is that the proposed change will not harm minority-supported candidates because minority voters do not single-shot vote and, by themselves, are too small a share of the voting population to control the outcome of an at-large election. This reasoning, however, does not fully embrace the level of minority electoral success, albeit limited, that has been achieved to date within the school district. While it does appear that under the existing at-large, staggered term election system there are limited opportunities for the effective use of single-shot voting, a candidate apparently preferred by the minority community has gained election to the school board with significant crossover from white voters. This minority candidate ran successfully only in years in which there were three seats up for election and, even then, placed last among the winning candidates when there was white opposition. As noted earlier, it is questionable whether this minority candidate, the incumbent African-American trustee, could continue under the proposed system to be elected to the school board because she would have to place first in contests in which there was white opposition.

Finally, as we understand it, the school district's third claim is that the proposed change may actually benefit minority voters by ensuring that white voters will not be able to "single-shot" vote for a white candidate and thereby deny minority candidates the white votes they need in order to win election. Our experience analysing the impact of electoral devices such as the proposed numbered posts requirement does not support this conclusion. It is true that the implementation of numbered posts will prevent any use of the technique of "single-shot" voting. In our experience, however, "single-shot" voting is generally utilized by minority voters to boost the effect of their support for a preferred candidate in multi-seat, at-large election contests where voting is racially polarized, rather than by white voters who are a majority of the electorate; no information provided to us during our review of the instant submission would require a different conclusion. Implicit in this claim by the school district, however, is the view that when white voters limit their vote to a single candidate, they are more likely to choose a white rather than a minority candidate. This observation is consistent with our experience and adds to the evidence indicating that in single-seat contests for the school board, minority-supported candidates are unlikely to place first ahead of white candidates, and, indeed, are in a worse position than under the existing at-large system to elect candidates of their choice.

Under these circumstances, I am unable to conclude as I must under Section 5 that the school district has met its burden of demonstrating that the submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). Therefore, on behalf of the Attorney General, I must object to the addition of numbered posts for the Sealy Independent School District.

A change from single member district elections in Haskell, Knox and Throckmorton Counties. After minority organizations were successful in forcing a School district into single member districts, it turns around and attempts to restore at large elections.

September 24, 2001

Cheryl T. Mehl, Esq.
Schwartz & Eichelbaum
800 Brazos Street
Suite 870
Austin, Texas 78701

This refers to the change in the method of election from single-member districts to an at-large system employing cumulative voting, its implementation schedule, and the subsequent revision of the implementation schedule as subsequently revised for the Haskell Consolidated Independent School District in Haskell, Knox, and Throckmorton Counties, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our February 5, 2001, request for additional information on July 25, and September 5, 6, 7, and 12, 2001.

We have considered carefully the information you have provided, as well as Census data, and comments and information from other interested parties. According to the 2000 Census, the Haskell Consolidated Independent School District [the district] has a population of 3,845, of whom 19.7 percent are Hispanic and 3.2 percent are black persons.

Our analysis of the district's electoral history indicates that under the current method of election, which utilizes seven single-member districts, Hispanic voters have been able to elect candidates of their choice to office in at least one district. We note that this election method resulted from the settlement of federal litigation claiming that the previous method, an at-large system with staggered terms, violated Section 2 of the Voting Rights Act. *League of United Latin American Citizens, District 5 LULAC v. Haskell Consolidated Independent School Districts*, No. 193-CV-0178(C) (N.D. Tex. Oct. 21, 1994). The school district implemented the single-member district system, which contained one district with a Hispanic population majority, in 1995.

Under a cumulative voting system, voters are allocated a number of votes equal to the number of offices that are being contested at that particular election and can assign all of their votes to one candidate. Thus, a candidate supported by voters who are a minority of the electorate can win with support from fewer voters than in a traditional at-large election. A statistical measure, known as the "threshold of exclusion," can determine the lowest percentage of support from a single group that ensures their candidate will win no matter what other voters do. This level of support is 33 percent in a two-seat race and 25

percent in a three-seat race. Thus, for Hispanic voters to elect a candidate of their choice in a three-seat contest, they must either constitute 25 percent of the electorate or be able to count on enough non-Hispanic votes to reach that threshold. The school district has conceded that it will be virtually impossible for minority voters to elect at least one candidate of their choice under the board's proposed method of election without non-Hispanic cross-over voting. Accordingly, we have examined the ability of candidates supported by the Hispanic community to attract non-Hispanic votes in past elections.

Only one Hispanic candidate had been elected to the board of trustees prior to the implementation of single-member districts in 1995. From 1981 to 1994, there were five attempts by four Hispanic candidates to win a seat on the school board. Based on the information provided by the district, in only one instance has a Hispanic candidate's vote total exceeded the threshold of exclusion. In the 1993 contest for Place 1, a Hispanic candidate's vote total exceeded the threshold by only 0.8 percentage points. Accordingly, based on the information available, it appears that candidates favored by the Hispanic community have not consistently received significant non-Hispanic cross-over voting, much less at the levels claimed by the district.

Given the demographics of the school district and apparent voting patterns within it, the jurisdiction has not carried its burden that the proposed change will not significantly reduce the ability of minority voters to elect candidates of their choice to the school board.

We have also examined the reasons proffered by the district in support of the change, such as allegedly low voter turnout during the time that it utilized single-member districts as compared to purportedly higher turnout under the at-large system. An analysis of past voter turnout information does not support the board's position. For example, in May 2001, the board claims that less than one percent of the registered voters in District 1 cast a ballot. A closer examination indicates that the candidate for that position was unopposed and the election would have been cancelled, with the candidate being sworn into office, had there not been another office on the ballot being contested.

Moreover, in both the Section 5 submission and at the February 10, 2000, public hearing, school board officials claimed that voter turnout was higher in at-large elections. The district cited the 1993 election, calculating that 1,465 persons voted, a 64.5 percent turnout rate, and, the 1994 election in which 1,863 persons, or 73 percent of the registered voters voted, as evidence of the need to return to at-large elections. This assertion does not withstand close scrutiny. In both of these elections, two numbered posts were up for election and a voter could vote for both posts. According to the 1993 election returns, there were 730 votes for Place I candidates and 735 votes for Place II candidates for a total of 1,465. The 1994 figure of 1,863 is the result of similar calculation. The only way to arrive at the district's numbers is to assume that every voter who cast a ballot for one post chose not to vote for the second office. We do not believe that such an assumption is warranted here.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5, 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the change to cumulative voting with staggered terms.

In its request for preclearance, the district notes that if, in fact, the change is retrogressive, individuals in the minority community would be free either to petition the board to change the method of election or to institute further litigation. This suggestion ignores the essential purpose of Section 5, which is to ensure that gains achieved by minority voters not be subverted by retrogressive changes. Accordingly, we can not accede to the district's request.

The City of Freeport, located on the Texas Gulf Coast also attempts to go back to at-large elections. Another attempt to frustrate successful Federal Court Action by minority voters. They just keep on keeping on.

August 12, 2002

Wallace Shaw, Esquire
P.O. Box 3073
Freeport, Texas 77542-1273

Dear Mr. Shaw:

This refers to the procedures for conducting the May 4, 2002, special city charter amendment election and the change in the method of electing city council members from districts to at large for the City of Freeport in Brazoria County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our May 14, 2002, request for additional information through July 31, 2002.

With regard to the special election, the Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

As to the change to at-large elections with numbered positions, we have carefully considered the information you have provided, as well as census data, comments and information from other interested parties, and other information, including the city's

previous submission of the adoption of the current districting system for the election of council members. Based on our analysis of the information you have provided, on behalf of the Attorney General, I am compelled to object to the submitted change in the method of election.

According to the 2000 Census, the city has a total population of 12,708, of whom 6,614 (52.0 percent) are Hispanic and 1,696 (13.3 percent) are black persons. Hispanic residents comprise 47.3 percent, and black residents 12.3 percent, of the city's voting age population. Approximately 29 percent of the city's registered voters are Spanish-surnamed individuals.

Until 1992, the city elected its four-member council on an at-large basis. In that year it began to use the single-member district system, which it had adopted as part of a settlement of voting rights litigation challenging the at-large system. Under the subsequent single-member district method of election, minority voters have demonstrated the ability to elect candidates of choice in at least two districts, Wards A and D. The city now proposes to reinstitute the at-large method of election. Our analysis shows that the change will have a retrogressive effect on the ability of minority voters to elect a candidate of their choice.

Elections in the city are marked by a pattern of racially polarized voting. Under the city's previous use of at-large elections, no Hispanic-preferred candidates were successful until 1990. In that election, one such candidate narrowly won office when several Anglo-supported candidates split the vote. In contrast, a Hispanic-preferred candidate won over significant Anglo opposition in 1992 in the first election held under the single-member district system. Since then, three other minority-preferred candidates have been successful in their wards. However, minority voters remain unable to elect their candidates of choice in municipal at-large elections. Thus, a return to an electoral system where all council offices are elected on an at-large basis will result in a retrogression in their ability to exercise the electoral franchise that they enjoy currently. A voting change has a discriminatory effect if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 328 (2000); *Beer v. United States*, 425 U.S. 130, 140-42 (1976).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the change in the method of election.

The 2001 Redistricting of the Texas House of Representatives has the effect of making it more difficult for Racial and Ethnic minorities to elect the representatives of their choice just as the State's redistricting plans in 1991, 1981, 1971 and 1961 have done. To coin a phrase: "Foolish consistency remains the hobgoblin of racially polarized minds."

The significance of this is not to be ignored. The growth in Texas from 1990 through 2000 was largely Hispanic. Yet the new districting plan would not have produced more districts in which minority voters could elect the candidates of their choice but have reduced those districts by three (3).

Disappearing minority elected officials in a trick of redistricting magic--Houdini could have not done better. Except this is not illusion, it is racial gerrymandering as it has historically been played in Texas.

November 16, 2001

The Honorable Geoffrey Connor
Acting Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Secretary Connor:

This refers to the 2001 redistricting plan for the Texas House of Representatives, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on August 17, 2001; supplemental information was received through October 12, 2001.

We have considered carefully the information you have provided, as well as census data, comments and information from other interested parties, and other information. As discussed further below, I cannot conclude that the State's burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the 2001 redistricting plan for the Texas House of Representatives.

The 2000 Census indicates that the State has a total population of 20,851,820, of whom 11.5 percent are African American and 31.9 percent are Hispanic. The State's voting age population (VAP) is 14,965,061, of whom 10.9 percent are African American and 28.6 percent are Hispanic. One of the most significant changes to the State's demography has been the increase in the Hispanic population. Between 1990 and 2000, the Hispanic share of the State's population increased from 26 to 31.9 percent. Statewide, African American population remained stable.

Under the Voting Rights Act, a jurisdiction seeking to implement a proposed change affecting voting, such as a redistricting plan, must establish that, in comparison with the status quo, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." See *Beer v. United States*, 425 U.S. 130, 141 (1976). In addition, the jurisdiction must establish that the change was not adopted with an intent to retrogress. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 340 (2000). Finally, the submitting authority has the burden of demonstrating that the proposed change has neither the prohibited purpose nor effect. *Id.* at 328; see also *Procedures for the Administration of Section 5* (28 C.F.R. 51.52).

The constitutional requirement of one-person, one-vote mandated that the State reapportion the house districts in light of the population growth since the last decennial census. We note that the redistricting plan submitted by the State was passed by the Legislative Redistricting Board (LRB), which had assumed reapportionment responsibility under Article III of the Texas Constitution after the State legislature was unable to enact a redistricting plan.

The LRB held a series of meetings and hearings, culminating with a meeting on July 24, 2001, at which it considered new plans submitted by LRB members. The LRB adopted three amendments making substantive changes to the plan then under consideration. These amendments consisted of approximately 14 discrete changes.

The Texas House of Representatives consists of 150 members elected from single-member districts to two-year terms. Under the existing plan, there are 57 districts that are combined majority minority in total population, and 53 are combined majority minority in voting age population. With regard to those with a majority minority voting age population, 31 districts have a majority Hispanic voting age population, seven have a majority black voting age population, and the remaining 15 districts have a combined minority majority voting age population. There are 27 districts where a majority of the registered voters have a Spanish surname.

An initial issue arises as to the appropriate standard for determining whether a district is one in which Hispanic voters can elect a candidate of choice. The State of Texas has provided, and accepted as a relevant consideration, Spanish-surnamed registered voter data as well as election return information and voting age population data from the census. We agree with the State's assessment, although we also consider comments from local individuals familiar with the area, historical election analysis, analysis of local housing trends, and other information intended to create an accurate picture of citizenship concerns. *Campos v. Houston*, 113 F.3d 544, 548 (5th Cir. 1997).

Our examination of the State's plan indicates that it will lead to a prohibited retrogression in the position of minorities with respect to their effective exercise of the electoral franchise by causing a net loss of three districts in which the minority community would have had the opportunity to elect its candidate of choice. Although there is an increase in the number of districts in which Hispanics are a majority of the voting age population, the

number of districts in which the level of Spanish surnamed registration (SSRV) is more than 50 percent decreases by two as compared to the benchmark plan. Moreover, we note that in two additional districts SSRV has been reduced to the extent that the minority population in those districts can no longer elect a candidate of choice. In the State's plan these four reductions are only offset by the addition of a single new majority minority district - District 80 - leaving a net loss of three.

As described more fully below, when coupled with an analysis of election returns and other factors, we conclude that minority voting strength has been unnecessarily reduced in Bexar County, South Texas, and West Texas. Because retrogression is assessed on a state-wide basis, the State may remedy this impermissible retrogression either by restoring three districts from among these problem areas, by creating three viable new majority minority districts elsewhere in the State, or by some combination of these methods.

With regard to the problem areas we have identified, in Bexar County the 2000 Census data indicated that the county population constituted 10.4 ideal districts. As a result of the State's constitutional requirement of assigning a whole number of districts to the more populous counties, known as the "county line rule," the State reduced the number of districts in the county from 11 in the existing plan to 10. Although the State has admitted that the reduction to 10 would not have precluded it from maintaining the number of majority Hispanic districts at seven, it in fact chose to reduce that number to six. Initially, the State asserted that it had created an additional majority Hispanic district in Harris County so as to offset the loss of the Bexar County district and identified District 137 as a compensating district. Because the State's obligation under Section 5 is to ensure that the redistricting plan, as a whole, is not retrogressive, such a course of action is not impermissible. However, in the supplemental materials that were provided on October 10, 2001, the State notified us that if any district should be considered as the replacement, District 80 in South Texas - not District 137 - should be the one which offsets the loss of the majority Hispanic district in Bexar County.

When the State is considered as a whole, however, this argument is ultimately unpersuasive. While District 80 indeed adds an additional district in which Hispanic voters in South Texas will have the opportunity to elect a candidate of their choice, in two other districts, as discussed below, they lose this opportunity, resulting in the net loss for Hispanic voters of one district in South Texas. In South Texas Hispanic voters will lose the opportunity to elect their candidate of choice in District 35. The new district is created from existing Districts 31 and 44 and pairs a nonminority and a Hispanic incumbent. The Hispanic incumbent currently represents a district which has a Spanish surname registration level of 55.6 percent; that level drops to 50.2 percent in the proposed plan while the Hispanic voting age population decreases from 57.8 to 52.1 percent. Over half (58%) of the new district's configuration is from the nonminority incumbent's former district. Our analysis indicates that District 35 as drawn will preclude Hispanic voters from electing their candidates of choice. In addition, in Cameron County District 38 reverts to a configuration that previously precluded Hispanic residents from electing a candidate of their choice. The Spanish surnamed registration level is reduced from 70.8

to 60.7 percent, and the Hispanic voting age population decreases from 78.7 percent to 69.6 percent. The State removed over 40 percent of the core of existing District 38, 90 percent of whom are Hispanic persons, and replaced it with population that is 45 percent nonminority. While the Hispanic voters in District 38 still remain a majority of voters in the district, because the area is subject to polarized voting along racial lines and under the particular circumstances present in this district, it is doubtful that Hispanics will be able to elect their candidate of choice.

Finally, the districts adjacent to Districts 35 and 38 have levels of Spanish surnamed registered voters exceeding 80 percent, and Hispanic voting age population exceeding 90 percent, both of which are far beyond what is necessary for compliance with the Voting Rights Act. Thus the reductions in Districts 35 and 38 were avoidable had the State avoided packing Hispanic voters into the districts adjacent to them. Moreover, overall the State fragments the core of majority Hispanic districts in this area, thus affecting member-constituent relations and existing communities of interest in these districts at a disproportionately higher rate than it does other districts in this part of the State. This fragmentation is unnecessary and disadvantages Hispanic voters by requiring them to establish new relations with their elected representatives. It also deviates from the State's traditional redistricting principles in a manner that exacerbates the retrogression in South Texas.

As for West Texas, Hispanic voters lose the opportunity to elect their candidate of choice in proposed District 74. The Spanish surname registration level decreases from 64.5 to 48.7 percent, and the Hispanic voting age population decreases from 73.4 to 57.3 percent. Significantly, the State did not need to reconfigure existing District 74 because the existing configuration under the 2000 Census was underpopulated by only 894 persons, a deviation of 0.64 percent. Such unnecessary population movement supplements our finding in our election analysis that Hispanic voters in District 74 will suffer a retrogression in the effective exercise of the electoral franchise. See Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, 66 Fed. Reg. 5411, 5413 (Jan. 18, 2001).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973); see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. On behalf of the Attorney General, I must object to the 2001 redistricting plan for the Texas House of Representatives. Beyond the specific discussion above, however, in all other respects we find that the State has satisfied the burden of proof required by Section 5.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R.

51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the redistricting plan continues to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

Waller County is at once a white flight area from heavily minority Houston but also the location of Prairie View A & M one of the traditionally African American land grant colleges. This is the latest of a more than 40 year history of limiting African Americans going to school there from interfering with local politics by voting. At first, the county attempted to just prohibit the Black students from voting at all. After several different federal and appellate courts found that such actions violated Section 2 and the 14th Amendment, the County now tries to accomplish the same thing through racial gerrymandering.

The significance of this case is that if you look at the legislative history which led to extension of the special provisions of the Voting Rights Act to include Texas you find this Waller County discrimination to be one of the things Congress was concerned about. Things do not change in Texas racial politics. Cf:

[*Wilson v. Symm*, 341 F. Supp. 8 (D. Tex., 1972) (the statutory presumption of student non-residency contained in Article 5.08(k) of the Texas Election Code is constitutional.); *Ballas v. Symm*, 351 F. Supp. 876 (D. Tex., 1972); *United States v. Texas*, 430 F. Supp. 920 (D. Tex., 1977); *Ballas v. Symm*, 494 F.2d 1167 (5th Cir.-OLD, 1974)^{4/} (the

^{4/} The strength of the feeling about the Waller County attempt to make it difficult for Black residents of Prairie View to register and vote can be seen in the efforts on the parts of the State of Texas to make this embarrassing issue go away. Secretary of State Bullock (who in 1971 was the only state official supporting the expansion of the Voting Rights Act to cover Texas had attempted to allow Blacks to vote by issuing a directive from his position as Chief Election Officer of the state. This attempt to correct a problem was voided by Federal Judge Noel which was actually permitted to stand by the Fifth Circuit *Ballas v. Symm*, 494 F.2d 1167 (5th Cir.-OLD, 1974). By 1978, the Federal Voting Rights Act was extended to Texas and things began to change in Waller County:

The trial court's opinion in *Ballas v. Symm*, 351 F. Supp. 876, at 877, discusses the fact that on October 2, 1972, the United States District Court for the Eastern District of Texas (Judge Wayne Justice) decided *Whatley*, holding at the trial court level that the statutory presumption contained in Article 5.08(k) was unconstitutional. The opinion also discusses the fact that on October 3, 1972, the Chief Election Officer of the State of Texas, Secretary of State, Robert Bullock, issued a bulletin to all voting registrars, advising that:

"No county registrar may require any affidavits or questionnaire in addition to the information required on the application for a voter registration certificate."

statutory presumption of student non-residency contained in Article 5.08(k) of the Texas Election Code is constitutional); *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973), cert. denied (1974) (the statutory presumption of student non-residency contained in Article 5.08(k) of the Texas Election Code is unconstitutional.);⁵ *Vera v. Richards*, 861 F. Supp.

The trial court in **Ballas** held that this bulletin and Bullock's acceptance of Judge Justice's decision in *Whatley* was:

"Utterly lacking in candor or credibility; legally incorrect; misleading; in excess of his statutory authority, and irrelevant."

351 F. Supp. at 888.

Subsequent to Judge Noel's decision in *Ballas* in November of 1972, the Fifth Circuit decided *Whatley* in August of 1973, holding that Bullock's legal position, as stated in his memorandum, and Judge Justice's trial decision in *Whatley* were in fact legally correct and that Article 5.08(k) was unconstitutional.

United States v. Texas, 445 F. Supp. 1245, 1246 (D. Tex., 1978)

⁵/ The claims of the United States are asserted against Symm, the County Commissioners of Waller County, the State of Texas, Mark White, Secretary of State of the State of Texas, and John Hill, Attorney General of the State of Texas.

Hill and White answer by alleging that they have done everything within their power to guarantee the dormitory students of Prairie View their rights under the 14th, 15th and 26th Amendments and also assert that the use of the Symm questionnaire has had the practical effect of discouraging applicants for registration from completing the registration process. John Hill also asserts a cross-claim against Leroy Symm, stating that on September 1, 1977, the Secretary of State adopted Emergency Rule 004.30.05.313 prohibiting the use of questionnaires of the type employed by Symm. John Hill asserts that under the Texas Election Code, the Secretary of State had authority to issue this Emergency Rule, and prays [**10] that this court enjoin Symm from continuing to use the questionnaire contrary to the directions of the Emergency Rule adopted by the Secretary of State.

In answer to the cross claims asserted by White and Hill, Symm has filed a cross-claim against White asserting that White's Emergency Rule 004.30.05.313 is contrary to the laws of the State of Texas and in excess of the legal authority of the Secretary of State, and requesting this court to enter a Declaratory Judgment finding that White had no authority to issue (1) Emergency Rule 004.30.05.313 and (2) a letter of September 1, 1977 to Mr. Symm prohibiting Symm from continuing to use any voter registration procedure which required an applicant to provide any written information not required by Article 5.13b, subdivision 1, of the Texas Election Code. *United States v. Texas*, 445 F. Supp. 1245, 1248 (D. Tex., 1978)

1304, 1327 (D. Tex., 1994) (“Waller County was split into.... District 14 [which] contained 56.9% African-American and Hispanic population [while] the part of the county allocated to District 8 contained only 8.6% African-American and Hispanic population.”) ; *United States v. Texas*, 445 F. Supp. 1245 (D. Tex., 1978)]

June 21, 2002

Denise Nance Pierce, Esq.
Bickerstaff, Heath, Smiley,
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816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443

Dear Ms. Pierce:

This refers to the 2001 redistricting plans for the commissioners court, justice of the peace, and constable districts; the renumbering and realignment of voting precincts; two polling place changes; the elimination and renaming of polling places; and the temporary additional early voting locations and their hours for Waller County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our February 6, 2002, request for additional information through June 10, 2002.

We have considered carefully the information you have provided, as well as census data, comments from interested parties, and other information, including the county's previous submissions. As discussed further below, I cannot conclude that the county's burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the 2001 redistricting plans for the commissioners court, justice of the peace, and constable districts.

The 2000 Census indicates that Waller County has a total population of 32,663 persons, of whom 9,565 (29.3%) are black and of whom 6,344 (19.4%) are Hispanic. The county's voting age population is 24,277, of whom 7,601 (31.3%) are black and 3,871 (15.9%) are Hispanic.

The county is governed by a five-member commissioners court. Voters elect four commissioners to four-year, staggered terms from single-member districts, called precincts. The justice of the peace and constable districts are coterminous with the commissioners court districts. Under the census data above, there are two districts under the benchmark plan, Precinct 1 and Precinct 3, in which minority persons are a majority of the voting age population: Precinct 1 has a total minority voting age population of 52.5 percent, while Precinct 3 has a total minority voting age population of 71.9 percent.

In contrast, the proposed 2001 redistricting plans contain only one district in which minority persons are a majority of the voting age population. According to the information that you provided, the black percentage of the voting age population in proposed Precinct 1 voting age population drops to 29.7 percent. Within the context of electoral behavior in Waller County, the county has not established that implementation of this plan will not result in a retrogression in the ability of minority voters to effectively exercise their electoral franchise. Moreover, the viability of alternative plans demonstrates that the potential retrogression of the proposed plan is avoidable.

Our analysis of county elections shows that minority voters in Precinct 1 have been electing candidates of choice since 1996, and that those candidates are elected on the basis of strong, cohesive black and Hispanic support. **Our statistical analysis also shows that white voters do not provide significant support to candidates sponsored by the minority community, and that interracial elections are closely contested.** For example, the black candidate for commissioner in Precinct 1 prevailed in the last election by two votes. As a result, the proposed reduction in the minority voting age percentage in Precinct 1 casts substantial doubt on whether minority voters would retain the reasonable opportunity to elect their candidate of choice under the proposed plan, particularly if the current incumbent in Precinct 1 declines to run for office again.

Our review of the county's benchmark and proposed plans as well as the alternative plans presented to the county, suggests that the significant reduction in minority voting age population percentage in Precinct 1 in the proposed plan, and the likely resulting retrogressive effect on the ability of minority voters to elect candidates of choice, was neither inevitable nor required by any constitutional or legal imperative. Illustrative plans demonstrate that it is possible to avoid any retrogression in Precinct 1, maintain the minority voting strength in Precinct 3, and meet the county's redistricting criteria. Accordingly, we are not persuaded by the county's contention that a reduction in minority voting strength in Precinct 1 was necessary to preserve the minority voting strength in Precinct 3 if one is to honor the redistricting criteria used by the county.

Under the Voting Rights Act, a jurisdiction seeking to implement a proposed change affecting voting, such as a redistricting plan, must establish that, in comparison with the status quo, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." See *Beer v. United States*, 425 U.S. 130, 141 (1976). If the proposed plan materially reduces the ability of minority voters to elect candidates of their choice to a level less than what they enjoyed under the benchmark plan, preclearance must be denied. State of *Georgia v. Ashcroft*, C.A. No. 2001-2111 (D.D.C. Apr. 5, 2002), slip op. At 117-18. In addition, the jurisdiction must establish that the change was not adopted with an intent to regress. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 340 (2000). Finally, the submitting authority has the burden of demonstrating that the proposed change has neither the prohibited purpose nor effect. *Id.* at 328; see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52).

In light of the consideration discussed above, I cannot conclude that your burden of showing that a submitted change does not have a discriminatory effect has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the submitted redistricting plans.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the changes continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

Please note that the Attorney General will make no determination regarding the submitted realignment and renumbering of voting precincts, the polling place changes, the elimination and renaming of polling places, and the temporary additional early voting locations and their hours because those changes are dependent upon the redistricting plan.

Further, in our letter of February 2, 2002, we informed you that, under the Voting Rights Act, changes, such as the county's proposed redistricting plans, are not legally enforceable until the jurisdiction has obtained Section 5 preclearance for those changes. *Clark v. Roemer*, 500 U.S. 646 (1991). However, it is our understanding that on March 12, 2002, Waller County conducted an election, which implemented the proposed plan, without such preclearance. Please inform us of the action Waller County plans to take regarding both the objection interposed by this letter as well as the conduct of the March 12 primary election without the requisite preclearance.

IV. The Following cases are directly related to Section 5 preclearance.

***Texas v. United States.* There are lots of these cases and until 1970 or so they related to prisons or school desegregation. Since 1970 they relate to minority vote dilution. This case involved efforts by the Texas Education Agency to take power away from school boards which had become dominated by minority trustees.**

On March 31, 1998, the Supreme Court unanimously held that a Section 5 declaratory judgment action filed by the State of Texas in the United States District Court for the District of Columbia was not ripe for litigation. The case concerned whether the appointment of certain officials could replace elected school boards and require Section 5 preclearance. *Texas v. United States*, 523 U.S. 296 (1998).

On June 27, 1997, the Supreme Court decided in a per curiam decision that changes in the manner of selecting election judges in Dallas County, Texas could be covered changes under Section 5. *Foreman v. Dallas County, Texas*, 521 U.S. 979 (1997).

SUMMARY: On November 1, 1972, Texas became a covered jurisdiction for purposes of 5 of Voting Rights Act of 1965 (42 USCS 1973c). In 1983 and several times thereafter, a Texas county changed procedures for selecting election judges, who were responsible for supervising voting at the polls on election days. Each of the new methods used party-affiliation formulas of one sort or another. After such a change in 1996, various parties brought suit in the United States District Court for the Northern District of Texas against the county and others, in which suit it was claimed that 5 required the changes to be precleared by the United States Department of Justice. A three-judge panel of the District Court (1) concluded that (a) preclearance was not required, as the county had simply exercised its discretion, under a state statute, to adjust the procedure for appointing election judges according to party power, and (b) the Department's preclearance of a 1985 submission from the state--the recodification of the entire Texas election code--operated to preclear the county's use of partisan considerations in selecting election judges; (2) entered an interlocutory judgment denying injunctive relief; and (3) dismissed the complaint.

On direct appeal, the United States Supreme Court (1) vacated the District Court's judgment which had dismissed the complaint, (2) dismissed the appeal from the District Court's interlocutory judgment, and (3) remanded the case for further proceedings. In a per curiam opinion expressing the unanimous view of the court, it was held that (1) the fact that the county had exercised its discretion, pursuant to state statute, to adjust the procedure for appointing election judges according to party power did not mean that the methods at issue were exempt from 5 preclearance; (2) the preclearance of Texas' 1985 submission did not operate to preclear the county's use of partisan considerations in selecting election judges, as the submission had been insufficient to put the Department on notice that the state was seeking preclearance of the use of specific, partisan-affiliation methods for selecting such judges; and (3) remand was necessary, because (a) the record was silent as to the procedure used by the county for appointing election judges as of November 1, 1972, and (b) thus, the Supreme Court could make no final determination as to whether preclearance was in fact required.

This case is an effort in Dallas County to discourage minority voting by changing the election officials. In Texas parlance-- there is more than one way to skin a cat.

Foreman v. Dallas County, 521 U.S. 979 (U.S., 1997)

PER CURIAM.

Texas by statute authorizes counties to appoint election judges, one for each precinct, who supervise voting at the polls on election days. In 1983 and several times thereafter, Dallas County changed its procedures for selecting these officials. Each of the new methods used party-affiliation formulas of one sort or another. After the most recent change in 1996, appellants sued the County and others in the United States District Court, claiming that § 5 of the Voting Rights Act 79 Stat. 439, as amended, 42 U.S.C. § 1973c, required that the changes be precleared.

A three-judge court held that preclearance was not required because the County was simply exercising, under the state statute, its "discretion to adjust [the procedure for appointing election judges] according to party power." App. to Juris. Statement 4a. The court apparently concluded that this "discretionary" use of political power meant that the various methods for selecting election judges were not covered changes under § 5. The court also concluded that the Justice Department's preclearance of a 1985 submission from the State--the recodification of its entire election code--operated to preclear the County's use of partisan considerations in selecting election judges. The court denied injunctive relief, and later dismissed appellant's complaint pursuant to Fed. Rule Civ. Proc. 12(b)(6). Appellants have brought both of these rulings here.

We believe that the decision of the District Court is inconsistent with our precedents. First, in *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985), we held that even "an administrative effort to comply with a statute that had already received preclearance" may require separate preclearance, because § 5 "reaches informal as well as formal changes." Thus, the fact that the County here was exercising its "discretion" pursuant to a state statute does not shield its actions from § 5. The question is simply whether the County, by its actions, whether taken pursuant to a statute [*981] or not, "enacted or [sought] to administer any . . . standard, practice, or procedure with respect to voting different from" the one in place on November 1, 1972. § 5. The fact that the County's new procedures used political party affiliation as the selection criteria does not mean that the methods were exempt from preclearance.

Second, the State's 1985 submission (the recodification and a 30-page summary of changes to the old law) indicated that the only change being made to the statute concerning election judges was a change to "the beginning date and duration of [their] appointment." Thus, neither the recodified statute nor the State's explanations said anything about the use of specific, partisan-affiliation methods for selecting election judges. This submission was clearly insufficient under our precedents to put the Justice Department on notice that the State was seeking preclearance of the use of partisan affiliations in selecting election judges. See, e.g., *Young v. Fordice*, 520 U.S. , (1997) (slip op., at 13-14); *Lopez v. Monterey Cty.*, 519 U.S. , (1996) (slip op., at 5); *Clark v. Roemer*, 500 U.S. 646, 658-659 (1991).

Because the parties agree that the record is silent as to the procedure used by Dallas County for appointing election judges as of November 1, 1972, the date on which Texas became a covered jurisdiction under the Voting Rights Act, we cannot make a final determination here as to whether preclearance is in fact required. We therefore vacate the

judgment of the District Court in No. 96-1389, dismiss the appeal from the District Court's interlocutory judgment in No. 96-987, see *Shaffer v. Carter*, 252 U.S. 37, 44 (1920), and remand for further proceedings.

It is so ordered.

This case is significant because Texas is arguing for an interpretation of Section 5 which would have effectively cut it off at the knees. As late as 1998, Texas is still fighting against the Voting Rights Act instead of trying to comply with it

Tex. v. United States, 523 U.S. 296 (U.S., 1998) ⁶

SYLLABUS: In 1995, the Texas Legislature enacted a comprehensive scheme (Chapter 39) that holds local school boards accountable to the State for student achievement in the public schools. When a school district falls short of Chapter 39's accreditation criteria, the State Commissioner of Education may select from 10 possible sanctions, including appointment of a master to oversee the district's operations, Tex. Educ. Code Ann. § 39.131(a)(7), or appointment of a management team to direct operations in areas of unacceptable performance or to require contracting out of services, § 39.131(a)(8). Texas, a covered jurisdiction under § 5 of the Voting Rights Act of 1965, submitted Chapter 39 to the United States Attorney General for a determination whether any of the sanctions affected voting and thus required preclearance. While the Assistant Attorney General for Civil Rights did not object to §§ 39.131(a)(7) and (8), he cautioned that under certain circumstances their implementation might result in a § 5 violation. Texas subsequently filed a complaint in the District Court, seeking a declaration that § 5 does not apply to the §§ 39.131(a)(7) and (8) sanctions. The court did not reach the merits of the case because it concluded that Texas's claim was not ripe.

Held: Texas's claim is not ripe for adjudication. A claim resting upon "contingent future events that may not occur as anticipated, or indeed may not occur at all," is not fit for adjudication. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581, 87 L. Ed. 2d 409, 105 S. Ct. 3325. Whether the problem Texas presents will ever need solving is too speculative. Texas will appoint a master or management team only after a school district falls below state standards and the Commissioner has tried other, less intrusive sanctions. Texas has not pointed to any school district in which the application of § 39.131(a)(7) or (8) is currently foreseen or even likely. Even if there were greater certainty regarding implementation, the claim would not be ripe because the legal issues Texas raises are not yet fit for judicial decision and because the hardship to Texas of withholding court consideration until the State chooses to implement one of the sanctions is insubstantial. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149. Pp. 4-6, 18 L. Ed. 2d 681, 87 S. Ct. 1507.

⁶/ This is federal litigation involved with the attempt by the Texas Education Agency to wrest political control of school districts from minority elected officials.

Affirmed.

Appellant, the State of Texas, appeals from the judgment of a three-judge district court for the District of Columbia. The State had sought a declaratory judgment that the preclearance provisions of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c, do not apply to implementation of certain sections of the Texas Education Code that permit the State to sanction local school districts for failure to meet state-mandated educational achievement levels. This appeal presents the question whether the controversy is ripe.

I

In Texas, both the state government and local school districts are responsible for the public schools. There are more than 1,000 school districts, each run by an elected school board. In 1995, the Texas Legislature enacted a comprehensive scheme (Chapter 39) that holds local school boards accountable to the State for student achievement. Tex. Educ. Code Ann. §§ 39.021-39.131 (1996). Chapter 39 contains detailed prescriptions for assessment of student academic skills, development of academic performance indicators, determination of accreditation status for school districts, and imposition of accreditation sanctions. It seeks to measure the academic performance of Texas schoolchildren, to reward the schools and school districts that achieve the legislative goals, and to sanction those that fall short.

When a district fails to satisfy the State's accreditation criteria, the State Commissioner of Education may select from 10 possible sanctions that are listed in ascending order of severity. §§ 39.131(a)(1)-(10). Those include, "to the extent the Commissioner determines necessary," § 39.131(a), appointing a master to oversee the district's operations, § 39.131(a)(7), or appointing a management team to direct the district's operations in areas of unacceptable performance or to require the district to contract for services from another person, § 39.131(a)(8). When the Commissioner appoints masters or management teams, he "shall clearly define their powers and duties" and shall review the need for them every 90 days. § 39.131(e). A master or management team may approve or disapprove any action taken by a school principal, the district superintendent, or the district's board of trustees, and may also direct them to act. §§ 39.131(e)(1), (2). State law prohibits masters or management teams from taking any action concerning a district election, changing the number of members on or the method of selecting the board of trustees, setting a tax rate for the district, or adopting a budget which establishes a different level of spending for the district from that set by the board. §§ 39.131(e)(3)-(6).

Texas is a covered jurisdiction under § 5 of the Voting Rights Act of 1965, see 28 CFR pt. 51, App. (1997), and consequently, before it can implement changes affecting voting

[*299] it must obtain preclearance from the United States District Court for the District of Columbia or from the Attorney General of the United States. 42 U.S.C. § 1973c. Texas submitted Chapter 39 to the Attorney General for administrative preclearance. The Assistant Attorney General * requested further information, including the criteria used to select special masters and management teams, a detailed description of their powers and duties, and the difference between their duties and those of the elected boards. The State responded by pointing out the limits placed on masters and management teams in § 39.131(e), and by noting that the actual authority granted "is set by the Commissioner at the time of appointment depending on the needs of the district." App. to Juris. Statement 99a. After receiving this information, the Assistant Attorney General concluded that the first six sanctions do not affect voting and therefore do not require preclearance. He did not object to §§ 39.131(a)(7) and (8), insofar as the provisions are "enabling in nature," but he cautioned that "under certain foreseeable circumstances their implementation may result in a violation of Section 5" which would require preclearance. Id., at 36a.

----- Footnotes -----

* The authority for determinations under § 5 has been delegated to the Assistant Attorney General for the Civil Rights Division. 28 CFR 51.3 (1997).

----- End Footnotes -----

On June 7, 1996, Texas filed a complaint in the United States District Court for the District of Columbia, seeking a declaration that § 5 does not apply to the sanctions authorized by §§ 39.131(a)(7) and (8), because (1) they are not changes with respect to voting, and (2) they are consistent with conditions attached to grants of federal financial assistance that authorize and require the imposition of sanctions to insure accountability of local education authorities. The District Court did not reach the merits of these arguments because it concluded that Texas's claim was not ripe. We noted probable jurisdiction. 521 U.S. (1997). [*300]

II

(2)HN2A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985) (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)). Whether Texas will appoint a master or management team under §§ 39.131(a)(7) and (8) is contingent on a number of factors. First, a school district must fall below the state standards. Then, pursuant to state policy, the Commissioner must try first "the imposition of sanctions which do not include the appointment of a master or management [*1260] team," App. 10 (Original Complaint P12). He may, for example, "order the preparation of a student achievement improvement plan . . . , submission of the plan to the Commissioner for approval, and implementation of the plan," § 39.131(a)(3), or "appoint an agency monitor to participate in and report to the agency on the activities of the board of trustees or the superintendent," § 39.131(a)(6). It is only if these less intrusive options fail that a Commissioner may appoint a master or management team, Tr. of Oral Arg. 16, and even then, only "to the extent the Commissioner determines

necessary," § 39.131(a). Texas has not pointed to any particular school district in which the application of §§ 39.131(a)(7) or (8) is currently foreseen or even likely. Indeed, Texas hopes that there will be no need to appoint a master or management team for any district. Tr. of Oral Arg. 16-17. Under these circumstances, where "we have no idea whether or when such [a sanction] will be ordered," the issue is not fit for adjudication. *Toilet Goods Assn., Inc. v. Gardner*, 387 U.S. 158, 163, 18 L. Ed. 2d 697, 87 S. Ct. 1520 (1967); see also *Renne v. Geary*, 501 U.S. 312, 321-322, 115 L. Ed. 2d 288, 111 S. Ct. 2331 (1991).

Even if there were greater certainty regarding ultimate implementation of paragraphs (a)(7) and (a)(8) of the statute, we do not think Texas's claim would be ripe. Ripeness "requires [*301] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). As to fitness of the issues: Texas asks us to hold that under no circumstances can the imposition of these sanctions constitute a change affecting voting. We do not have sufficient confidence in our powers of imagination to affirm such a negative. The operation of the statute is better grasped when viewed in light of a particular application. Here, as is often true, "determination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Longshoremen v. Boyd*, 347 U.S. 222, 224, 98 L. Ed. 650, 74 S. Ct. 447 (1954). In the present case, the remoteness and abstraction are increased by the fact that Chapter 39 has yet to be interpreted by the Texas courts. Thus, "postponing consideration of the questions presented, until a more concrete controversy arises, also has the advantage of permitting the state courts further opportunity to construe" the provisions. *Renne*, 501 U.S. at 323.

And as for hardship to the parties: This is not a case like *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), where the regulation at issue had a "direct effect on the day-to-day business" of the plaintiffs, because they were compelled to affix required labelling to their products under threat of criminal sanction. Texas is not required to engage in, or to refrain from, any conduct, unless and until it chooses to implement one of the noncleared remedies. To be sure, if that contingency should arise compliance with the preclearance procedure could delay much needed action. (Prior to this litigation, Texas sought preclearance for the appointment of a master in a Dallas County school district, and despite a request for expedition the Attorney General took 90 days to give approval. See Brief for Petitioner 37, n. 28.) But even that inconvenience is avoidable. If Texas is confident that [*302] the imposition of a master or management team does not constitute a change affecting voting, it should simply go ahead with the appointment. Should the Attorney General or a private individual bring suit (and if the matter is as clear, even at this distance, as Texas thinks it is), we have no reason to doubt that a district court will deny a preliminary injunction. See *Presley v. Etowah County Comm'n*, 502 U.S. 491, 506, 117 L. Ed. 2d 51, 112 S. Ct. 820 (1992); *City of Lockhart v. United States*, 460 U.S. 125, 129, n. 3, 74 L. Ed. 2d 863, 103 S. Ct. 998 (1983). Texas claims that it suffers the immediate hardship of a "threat to federalism." But that is an abstraction -- and an abstraction no graver than the

"threat to personal freedom" that exists whenever an agency regulation is promulgated, which we hold inadequate to support suit unless the person's primary conduct is affected. Cf. *Toilet Goods Assn.*, 387 U.S. at 164.

In sum, we find it too speculative whether the problem Texas presents will ever need solving; we find the legal issues Texas raises not yet fit for our consideration, and the hardship to Texas of biding its time insubstantial. Accordingly, we agree with the District Court that this matter is not ripe for adjudication.

The judgment of the District Court is affirmed.

V. Continued Need for Section 5

Although there has been significant improvement in the ability of Latinos to participate in the political process since the passage of the Voting Rights Act, LULAC believes that Section 5 and the other remedial provisions of the VRA are still needed today to insure that gains made are not eroded by future enactments and practices. As the discussion above shows Texas and its local jurisdictions continue to enact election provisions that aim to shove minorities back. Moreover, the Texas 2000 Redistricting Plan for the Texas House of Representatives failed to secure Section 5 approval because it reduced the number of districts that would allow Latinos to elect candidates by at least four districts.

Finally, a number of changes should be considered to strengthen the Voting Rights Act. For instance, vote dilution challenges under Section two are dependent on expert analysis. Yet, successful plaintiffs cannot recover the costs of expert witnesses under the current fee shifting provisions of the Act. This should be amended to allow recovery for successful plaintiffs in Voting Rights Act challenges. Moreover, recent Supreme Court cases have pulled back the scope of Section 5 coverage so that election practices that were adopted with a discriminatory purpose can only be challenged under Section 5 if it can be shown that the adopted voting change leads to a retrogression in the position of minority voters. Thus, if a jurisdiction has maintained a discriminatory election system and purposefully modifies that system to maintain its discriminatory features it cannot be challenged as violative of Section 5. Section 5 should be amended to allow review of the motive behind a voting procedures enactment.